
H. L. A. HART'S LOST ESSAY:
DISCRETION AND THE LEGAL PROCESS SCHOOL

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This Essay analyzes an essay by H. L. A. Hart about discretion that has never before been published, and has often been considered lost. Hart, one of the most significant legal philosophers of the twentieth century, wrote the essay at Harvard Law School in November 1956, shortly after he arrived as a visiting professor. In the essay, Hart argued that discretion is a special mode of reasoned, constrained decisionmaking that occupies a middle ground between arbitrary choice and determinate rule application. Hart believed that discretion, soundly exercised, provides a principled way of coping with legal indeterminacy that is fully consistent with the rule of law. This Essay situates Hart's paper — Discretion — in historical and intellectual context, interprets its main arguments, and assesses its significance in jurisprudential history. In the context of Hart's work, Discretion is notable because it sketches a theory of legal reasoning in depth, with vivid examples. In the context of jurisprudential history, Discretion is significant because it sheds new light on long-overlooked historical and theoretical connections between Hart's work and the Legal Process School, the American jurisprudential movement dominant at Harvard during Hart's year as a visiting professor. Hart's Discretion is part of our jurisprudential heritage, advancing our understanding of legal philosophy and its history.

INTRODUCTION

A few weeks before Thanksgiving, in 1956, H. L. A. Hart quietly gathered his thoughts as he watched “the most important public law thinkers”¹ of the Legal Process School take their seats at a new Harvard faculty seminar, unsure of what to expect. Hart was nervous. The exacting Oxford philosopher, at ease in logic tutorials and language games, was a stranger to the confident world of

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¹ William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2047 (1994).

“busy . . . proud . . . vocational”² American law professors. Though highly regarded as a brilliant legal theorist, he was far from uncontroversial. And that evening, just two months into his year as a visiting professor at Harvard, Hart was going to lecture his new colleagues on a family of issues they cared deeply about: discretion, its place in the legal system, and the relationship between legal indeterminacy and the rule of law.

For Hart, still getting his bearings at Harvard, giving a lecture on such a charged topic was a daunting prospect — especially given the “potentates”³ in his audience, which included Henry Hart,⁴ Albert Sacks, Herbert Wechsler, Paul Freund, and Lon Fuller — but also an opportunity to demystify his approach to legal scholarship. The analytical jurisprudence Hart had developed at Oxford — which prized conceptual clarity, logical rigor, and the careful study of language in legal analysis — aroused suspicion among his new colleagues, who wondered whether he was a “radical positivist,” as one American scholar had suggested just months before.⁵ What could Hart’s new jurisprudence offer legal scholars in the United States, for whom the study of law often hinged not on precise formulations of abstract concepts, but on insights into judicial behavior, institutional design, and social reality?

Exceptionally well versed in the history of American legal thought, Hart understood the persistent significance of the issues he had been asked to address.⁶ In the nineteenth century, legal formalists had argued that legal questions have determinate answers that skilled lawyers can reach by reasoning from a finite set of legal sources.⁷ By con-

² Letter from H. L. A. Hart, Professor of Jurisprudence, Univ. of Oxford, to Jenifer Hart (Nov. 4, 1956) (on file with the New College Library, University of Oxford) (describing his talk on discretion).

³ *Id.*

⁴ Henry M. Hart, Jr., and H. L. A. Hart were two different people. Henry Hart (1904–1969) was Dane Professor of Law at Harvard Law School; H. L. A. Hart (1907–1992) was Professor of Jurisprudence at Oxford. Together with Lon Fuller (1902–1978), Paul Freund (1908–1992), Herbert Wechsler (1909–2000), and others, the Harts were part of a generational cohort of legal thinkers who came to prominence in the immediate postwar period, sharing many concerns and aspirations discussed throughout this Essay.

⁵ Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of Its Usefulness*, 104 U. PA. L. REV. 1080, 1083 (1956).

⁶ This summary is a simplified explanation by way of introduction; it is certainly not intended as a comprehensive history of the idea of discretion, or of any school of thought in American jurisprudence.

⁷ See generally NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 9–65 (1995); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 9–31 (1992); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–97 (1996) (reviewing DUXBURY, *supra*).

trast, the realists of the early twentieth century had argued that judges and officials in fact exercise tremendous power of choice.⁸ While realists hoped that this power of choice could be deployed progressively to improve social conditions, they never developed a theory to direct or constrain choice in law. Rule by arbitrary choice is not rule by law, and thus the lasting legacy of legal realism became a challenge: explain how legal indeterminacy can be reconciled with the rule of law.

The problem of discretion became more pressing after the New Deal. Increased complexity in law meant more decisions, more indeterminacy, and greater need for a theory of what to do when indeterminacy arose. As they tried to figure out “how to have a dynamic, problem-solving government that [was] also lawlike and legitimate,”⁹ a group of post-New Deal professors, many of whom sat in Hart’s audience, developed a tentative solution to the realists’ challenge: discretion is acceptable in the legal system if it is sufficiently constrained and responsibly exercised. These “process theorists” accepted the realist idea that law is sometimes indeterminate, but pushed beyond realism, searching for a theory of how legal indeterminacy could be consistent with the rule of law. For process theorists, discretion and the rule of law could coexist symbiotically if responsible judges decided cases rationally, observing their institutional position with respect to the other branches of government, and explained their reasoning in writing, reflecting the judiciary’s professional craft, rationality, and wisdom — things in which the public could place its trust. Just two years before Hart’s arrival, the problem of discretion took on renewed, political urgency as *Brown v. Board of Education*¹⁰ posed the sharper “counter-majoritarian difficulty.”¹¹

When his audience settled, Hart delivered a plainspoken analysis of discretion as a phenomenon in life and law — conversational yet uncompromising in philosophical precision. As Hart saw it, discretion is a special form of constrained, reasoned decisionmaking based on appeal to rational principles. For Hart, true discretion exists when decisionmakers base their decisions on reason rather than on “whim”

⁸ Eskridge & Frickey, *supra* note 1, at 2048. See generally DUXBURY, *supra* note 7, at 65–161; JUSTIN ZAREMBY, LEGAL REALISM AND AMERICAN LAW (forthcoming Dec. 2013). See also BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) (a particularly nuanced account arguing against a clear formalist-realist distinction); and WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

⁹ Eskridge & Frickey, *supra* note 1, at 2047–48.

¹⁰ 347 U.S. 483 (1954).

¹¹ See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 203 (2d ed. 1986); see also *id.* at 244–72; LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 5–6 (1996) (commenting on how *Brown* changed the equation for law professors).

or “fancy.”¹² Further, Hart argued that discretion is a necessary component of any legal system, because society’s ability to regulate the future is inherently limited by imperfect information and an imperfect understanding of aims. As such, positive law will inevitably be partly indeterminate; there will necessarily be cases that require judges to “make” rather than merely to “find” law. In these cases, Hart argued, decisionmakers must exercise discretion — the special form of decisionmaking he had just described. Hart believed that indeterminacy is fully compatible with the rule of law as long as the method used to resolve indeterminate cases comports with the rational standards that distinguish discretion from arbitrary choice. For Hart, discretion was *part of law*, to be *perfected*, rather than an obstacle associated with the rule not of law but of men.

The talk set off a “storm” among the professors — and Hart relished it.¹³ Predictably, the professors tore into his linguistic approach and questioned his analytic style, but when it came to the substantive analysis of discretion, their objections subsided. Hart was proud of his performance, and he thought he had impressed his new colleagues.¹⁴ A few weeks later, he consolidated his analysis and produced an essay, *Discretion*.¹⁵ Hart circulated his essay to the members of his audience, the newly formed “Legal Philosophy Discussion Group,”¹⁶ who read it, discussed it, and used it as a theoretical backdrop for subsequent discussions — discussions that forged the ideas for some of the most famous “legal process classics.”¹⁷ “The lines of inquiry” pursued in the group, Henry Hart wrote to Lon Fuller the next autumn, “are of the greatest consequence to Al [Sacks] and me as we set out on the last lap of our effort to complete our materials on ‘*The Legal Process*.’”¹⁸

¹² H. L. A. Hart, *Discretion*, 127 HARV. L. REV. 652, 657 (2013) [hereinafter Hart, *Discretion*].

¹³ See Letter from H. L. A. Hart to Jenifer Hart, *supra* note 2.

¹⁴ See *id.*

¹⁵ See Hart, *Discretion*, *supra* note 12, at 652 n.†.

¹⁶ For information about the Legal Philosophy Discussion Group, see NICOLA LACEY, A LIFE OF H. L. A. HART 188 (2004); Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 51 (2013); and Eskridge & Frickey, *supra* note 1, at 2047–49.

¹⁷ Eskridge & Frickey, *supra* note 1, at 2048. For example, Lon Fuller presented a draft version of his seminal article, *The Forms and Limits of Adjudication*. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). This essay remained unpublished at the time of Fuller’s death, although it was widely read and circulated in draft form. In a brief introduction to the essay, Professor Kenneth I. Winston notes that it was first presented to the Legal Philosophy Discussion Group. See Kenneth I. Winston, *Special Editorial Note* to Fuller, *supra*, at 353, 353.

¹⁸ Letter from Henry Hart, Professor of Law, Harvard Law Sch., to Lon Fuller, Professor of Law, Harvard Law Sch. 3 (Nov. 5, 1957) (with copies to Al Sacks and John Dawson) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 4, Folder 2, and also preserved in the Papers of Henry M. Hart, Jr., Box 3, Folder 6) [hereinafter Nov. 5, 1957, Letter from Henry Hart to Lon Fuller].

Hart's essay has never been published, and until now it has been almost entirely unknown. It is not included in Hart's archive, perhaps due to his "prodigious levels of disorganization."¹⁹ Hart once "gestured to the piles of books and papers littering every surface of his room . . . and remarked to John Finnis: 'This [i.e., the chaos] has consumed a huge amount of my life.'"²⁰ Fate intervened, however, and Freund and Henry Hart each kept their copies of *Discretion* in their files. In time, those files became historical archives in the Harvard Law School Library, where I discovered H. L. A. Hart's "lost" essay more than half a century after it was written.²¹

A small group of scholars have known that Hart wrote an essay on discretion for the Legal Philosophy Discussion Group. Professor Anthony Sebok read Hart's manuscript and provided its greatest scholarly treatment to date, in a footnote in his book *Legal Positivism in American Jurisprudence* and in a short section of a separate article, insightfully analyzing some of the essay's broadest themes on the way to discussions of different topics.²² The other scholars who have mentioned *Discretion* believed the essay had been lost completely. Professors William Eskridge and Phillip Frickey refer to Hart's paper in their introduction to the 1994 edition — and first official publication — of (Henry) Hart and Sacks's *The Legal Process*. Eskridge and Frickey state that "H. L. A. Hart circulated his own paper on 'Discretion'"²³ "very probably presenting a point of view willing to admit that

¹⁹ LACEY, *supra* note 16, at 185.

²⁰ *Id.* at 186 (alteration in original) (quoting Hart).

²¹ It is deceptively easy to miss, as it is signed only with Hart's initials, H. L. A. H., and located in the Henry Hart and Paul Freund collections — places one would not normally expect to find material about H. L. A. Hart.

²² See ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 169 n.232 (2008); and Anthony J. Sebok, *Finding Wittgenstein at the Core of the Rule of Recognition*, 52 SMU L. REV. 75, 99–100 (1999), for the longest discussions of Hart's lost essay already published. Sebok insightfully notes the resonance with process theory and the relationship between the two Harts, but discusses Hart's *Discretion* only en route to other arguments. This interpretation of *Discretion* complements and builds on Sebok's brief discussion.

²³ William N. Eskridge, Jr. & Phillip P. Frickey, *Introduction* to HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at ci (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994). Eskridge and Frickey note that H. L. A. Hart's paper was "to be discussed with Henry Hart's paper." *Id.* Although H. L. A. Hart's and Henry Hart's papers may have been discussed together in later sessions, H. L. A. Hart delivered his paper at the meeting before Henry Hart delivered his, giving Henry Hart a chance to draft his paper after hearing his English colleague's views. H. L. A. Hart's letter to the group on November 19 says that he delivered the paper "last time," Hart, *Discretion*, *supra* note 12, at 652 n.†, while Henry Hart delivered his paper on November 20, see Notes of Henry M. Hart, Jr., Professor of Law, Harvard Law Sch., for a Talk on November 20, 1956 on *The Place of Discretion in the Legal System* (Nov. 20, 1956) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7) [hereinafter Hart Notes on *The Place of Discretion in the Legal System*].

much discretion could not be controlled by law.”²⁴ An article by Professor Michael Dorf makes reference to Hart’s “lost” essay and to the discussion group as part of an analysis of the philosophical foundations of the process movement.²⁵ Professor Nicola Lacey, in her critically acclaimed biography of Hart, mentions Hart’s contribution to the discussion group and notes that he “provoked a stormy debate.”²⁶ But Lacey was not aware that a copy of *Discretion* had survived. The remainder of the massive secondary literature on Hart and his legacy has ignored the essay completely.

In my mind, Hart’s essay raises a wealth of important questions. To start, H. L. A. Hart is a jurisprudential giant — the central figure in the postwar revival of legal positivism in the English-speaking world.²⁷ How has his essay on a subject as significant as discretion remained hidden for so long? How did H. L. A. Hart wind up writing an essay for a faculty group at Harvard in the first place, and how did Hart’s interests relate to the concerns of his Harvard colleagues? How does his analysis of discretion fit into the rest of his work? Did it resonate with the views of his Harvard colleagues? Did it influence their intellectual trajectory? His? Most importantly, what does *Discretion* reveal about the world in which it was written? I believe that H. L. A. Hart’s lost essay provides a window into our jurisprudential past, illustrating a critical moment in our intellectual history and advancing our understanding of theoretical problems of enduring importance. Making full sense of it requires both historical and philosophical context.

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Discretion reveals a new dimension to Hart’s work: the essay presented a theory in lockstep with the key themes of the Legal Process

²⁴ Eskridge & Frickey, *supra* note 23, at ci. Eskridge and Frickey mention the “Memorandum from H. L. A. Hart to the Legal Philosophy Discussion Group . . . circulating a paper on ‘Discretion,’ but no copy included.” *Id.* at ci n.215. The copy was in the archive in September 2012, along with the memorandum.

²⁵ Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 922 n.179 (2003) (commenting on Eskridge and Frickey’s discussion of H. L. A. Hart’s contribution to the discussion group).

²⁶ LACEY, *supra* note 16, at 188.

²⁷ For Hart’s biography, see LACEY, *supra* note 16. For information on Hart’s significance and legacy as a legal philosopher, see generally MICHAEL D. BAYLES, HART’S LEGAL PHILOSOPHY (1992); HART’S POSTSCRIPT (Jules L. Coleman ed., 2001); ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H. L. A. HART (Ruth Gavison ed., 1987); LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART (P. M. S. Hacker & J. Raz eds., 1977); NEIL MACCORMICK, H. L. A. HART (1981); MICHAEL MARTIN, THE LEGAL PHILOSOPHY OF H. L. A. HART: A CRITICAL APPRAISAL (1987); and THE LEGACY OF H. L. A. HART: LEGAL, POLITICAL AND MORAL PHILOSOPHY (Matthew H. Kramer et al. eds., 2008).

School.²⁸ Reasoned elaboration, constraints on judicial decision-making, and the recognition that law is a dynamic, multi-institutional enterprise all take center stage in Hart's analysis. Further, Hart's understanding of the way indeterminacy relates to the rule of law resonates strongly with process theory: indeterminacy is an inevitable, but perfectly acceptable, part of the legal system as long as it is resolved according to the appropriate method. Most significantly, *Discretion* illustrates the extent to which H. L. A. Hart and the leading figures of the Process School shared a common moment in the history of ideas — institutionally, on the Harvard campus and in the Legal Philosophy Discussion Group in 1956–1957, and theoretically, as seekers of a middle road between formalism and realism.

On occasion, scholars have identified a theoretical resonance between H. L. A. Hart's analytical positivism, expressed elsewhere, and process theory, though the connection remains largely unexplored. Sebok draws attention to a connection between (Henry) Hart and Sacks's account of legal authority and H. L. A. Hart's idea of the rule of recognition — the master rule that identifies valid legal norms — claiming that the central picture of law in *The Legal Process* is basically positivistic.²⁹ Dorf argues that H. L. A. Hart's positivism “entails a view about the institutional allocation of power remarkably close to the one articulated by (Henry) Hart and Sacks in *The Legal Process*.”³⁰ More specifically, Dorf argues that (Henry) Hart and Sacks's “principle of institutional settlement”³¹ — the idea “that decisions which are the duly arrived at result of duly established procedures . . . ought to be accepted as binding upon the whole society unless and until they are duly changed”³² — is a statement of legal positivism and represents “an effort to operationalize . . . the ‘rule of recognition.’”³³ Professor Charles L. Barzun points out that (Henry) Hart and Sacks offered a picture of law's basic origins — consisting of the need for one set of

²⁸ The Legal Process School was, of course, a somewhat amorphous group, and its membership and theoretical precepts are difficult to pin down precisely. This Essay does not attempt to problematize the Process School, but rather to draw attention to aspects of its history and context.

²⁹ Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2108–09 (1995). But see Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1155–60 (1999) (reviewing SEBOK, *supra* note 22) (agreeing with Professor Charles L. Barzun that process theory conflicted with legal positivism in important respects). The purpose of this Essay is not to consider the claim that (Henry) Hart and Sacks were legal positivists as a theoretical matter. For more on the rule of recognition, see generally MACCORMICK, *supra* note 27, at 105–33.

³⁰ Dorf, *supra* note 25, at 910.

³¹ *Id.* at 922 (emphasis omitted). For background on the principle of institutional settlement, see Sebok, *supra* note 29, at 2106–07.

³² Dorf, *supra* note 25, at 922 (alteration in original) (quoting HART & SACKS, *supra* note 23, at 4) (internal quotation marks omitted).

³³ *Id.*

substantive “understandings or arrangements” to guide “community life”³⁴ and “another set” of second-order “arrangements . . . to clarify what the substantive arrangements require in particular instances; . . . to determine when one of the substantive arrangements has been violated; and . . . to make a change to the existing set of substantive arrangements”³⁵ — that is “strikingly similar” to H. L. A. Hart’s hierarchy of primary rules and secondary rules of adjudication, change, and recognition.³⁶ On a final, intellectual-historical note, scholars have observed that process theory and analytical positivism were therefore both part of the broad “postwar liberal project,”³⁷ seeking an understanding of law that would bolster liberal values and distinguish liberal democracy from Nazism and fascism.

Discretion, however, significantly expands our understanding of these connections — connections that remain poorly understood in part because of the strong, and widely recognized links between process theory and the works of Fuller and Ronald Dworkin, theorists whom Hart argued against in celebrated debates.³⁸

At the same time, *Discretion* enhances our knowledge of Hart’s broader legal philosophy. In the context of Hart’s work, the essay is unusual in two respects. First, Hart emerges from *Discretion* as a theorist interested in law’s worldly functioning and the practical challenges of adjudication — not just in conceptual clarity. While many of Hart’s other writings are abstract and more purely philosophical, *Dis-*

³⁴ Barzun, *supra* note 16, at 26.

³⁵ *Id.* at 27.

³⁶ *Id.* at 27 n.105. Barzun says, however, that it is “deeply misleading” to take the characterization of process theory as positivistic too far. *See id.* at 26. Similarly, Eskridge and Frickey prefer “rationalism” to “positivism” as a description of the process ethos, noting that process theory involves the “interconnected integrity of law and morals.” *See Eskridge & Frickey, supra* note 23, at lv tbl.1. For information on Hart’s hierarchy of rules, see generally MACCORMICK, *supra* note 27, at 92–120.

³⁷ Anthony J. Sebok, *Reading the Legal Process*, 94 MICH. L. REV. 1571, 1575 (1996) (reviewing HART & SACKS, *supra* note 23) (“*The Legal Process* represents a significant episode in the postwar liberal project associated with Robert Dahl and John Rawls.”); *see also* Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969). For a discussion of Hart’s liberalism, see LACEY, *supra* note 16, at 56–57, 221–22; H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) [hereinafter Hart, *Positivism and the Separation of Law and Morals*]; and Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 N.Y.U. L. REV. 1059, 1069 (2008).

³⁸ *See* Dorf, *supra* note 25, at 910. For more information on the Hart-Fuller debate and its legacy, *see generally* THE HART-FULLER DEBATE IN THE TWENTY-FIRST CENTURY (Peter Cane ed., 2010). For more information on the Hart-Dworkin debate, *see generally* Scott J. Shapiro, *The “Hart-Dworkin” Debate: A Short Guide for the Perplexed* (Univ. of Mich. L. Sch. Pub. Law & Legal Theory Working Paper Series, Working Paper No. 77, 2007). For connections between Dworkin and the Process School, *see generally* Vincent A. Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks*, 29 ARIZ. L. REV. 413 (1987).

cretion is sensitive to law's institutional form as well as its conceptual structure, sensitive to the challenges faced by officials interpreting legal texts as well as the logical problems posed by words, and sensitive to the chaotic workings of the administrative state as well as the philosophical nature of government and its authority.³⁹ Lacey's introductory Essay perceptively argues that these institutional lines of thought ultimately did not "engage Hart's deepest interest."⁴⁰ Indeed, they all but disappeared from his work in later years. In this light, Hart's engagement with questions of institutional form in *Discretion* brings the Process School's influence on his thinking at Harvard into even sharper focus.

Second, *Discretion* sketched a theory of legal reasoning. Hart's later work pressed further into the conceptual structure of legal systems, the relationship between law and morality,⁴¹ and the theory of criminal law,⁴² but strangely, largely left this major theme of *Discretion* behind. Hart's relative silence on legal reasoning is a shortcoming of his legacy — one that left him vulnerable to attack in his debates with Fuller and Dworkin, in which legal reasoning was a primary axis of controversy. In fact, Hart regretted that *The Concept of Law*, his most famous book, skimmed over the topic so quickly: "I certainly wish to confess now that I said far too little . . . about the topic of adjudication and legal reasoning."⁴³ Scholars writing after Hart have repeatedly analyzed his theory of legal reasoning and the role of discretion in judicial decisionmaking based on the comparatively light treatment the topics receive in his published work.⁴⁴ Professor Gerald Postema, for example, perceptively observes that Hart believed that "deciding to apply a rule to an instance outside its settled core is often a matter of reasoned elaboration of the rule, drawing on diverse considerations running through the law."⁴⁵ The ideas in *Discretion* are

³⁹ Neil MacCormick's "institutional theory of law" emerged partly in response to Hart's lack of attention to institutional matters. See NEIL MACCORMICK, INSTITUTIONS OF LAW, at v (2007) (discussing Hart's "unchallengeable" "place in history" despite his failure to address law's institutional manifestation more fully).

⁴⁰ Nicola Lacey, *The Path Not Taken: H. L. A. Hart's Harvard Essay on Discretion*, 127 HARV. L. REV. 636, 639 (2013).

⁴¹ See, e.g., H. L. A. HART, LAW, LIBERTY AND MORALITY (1963); H. L. A. HART, THE CONCEPT OF LAW (3d ed. 2012) [hereinafter HART, THE CONCEPT OF LAW].

⁴² See, e.g., H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968).

⁴³ HART, THE CONCEPT OF LAW, *supra* note 41, at 259.

⁴⁴ See, e.g., BAYLES, *supra* note 27, at 174–81 (discussing judicial discretion in Hart's philosophy); MACCORMICK, *supra* note 39, at 121–32 (discussing "Judicial Discretion and the Judicial Role" in Hart's philosophy); Roger A. Shiner, *Hart on Judicial Discretion*, 5 PROBLEMA 341 (2011).

⁴⁵ Gerald J. Postema, *Positivism and the Separation of Realists from their Scepticism: Normative Guidance, the Rule of Law and Legal Reasoning*, in THE HART-FULLER DEBATE IN THE

consistent with what little Hart did say on the subject in later years, but they are far more comprehensive.⁴⁶ The essay fills a significant gap in Hart's work.

As Lacey's introductory Essay argues, Hart may have shied away from legal reasoning in later work out of anxiety that his understanding of it conflicted with his commitment to the rule of recognition as the ultimate criterion of legal validity, and with his commitment to the conceptual separation of law and morality. Tensions arising from these conflicts flared up in the "Postscript," where Hart recycled some of the arguments from *Discretion* in an abridged and less illuminating form. While *Discretion* may suggest why legal reasoning might have posed difficulties for Hart's analytical positivism, it reveals, at the same time, arguments Hart envisioned to answer such concerns.

In other ways, *Discretion* represents a missing link in Hart's intellectual development. The essay was one of his first academic endeavors in the year that proved to be the major "turning point" in his philosophical life.⁴⁷ "Ideas started pullulating at a rather alarming rate," Hart reflected; "I thought, am I going mad? . . . I was getting so many different things inside."⁴⁸ At the end of his year at Harvard, in April 1957, Hart delivered his Holmes Lecture, *Positivism and the Separation of Law and Morals* — a watershed event in the history of legal philosophy in which Hart expressed most of the key ideas that would be published five years later in *The Concept of Law*, "the most influential book in legal philosophy ever written in English."⁴⁹ The Holmes Lecture and *The Concept of Law* both drew from the ideas he ex-

TWENTY-FIRST CENTURY, *supra* note 38, at 259, 264. Postema offers an excellent analysis of Hart's understanding of the judicial role, and the discovery of the *Discretion* paper bolsters many of Postema's claims. *See id.*

⁴⁶ *The Concept of Law* and the "Postscript" advanced similar conclusions without much detail, as did the short introduction to *Essays in Jurisprudence and Philosophy*, written in 1983, where Hart mentioned that the notion "that judges, when they reach a point at which the existing settled law fails to determine a decision either way, simply push aside their law-books and start to legislate *de novo* for the case in hand without further reference to the law . . . has never been my view" and briefly endorsed a form of reasoned, discretionary decisionmaking in response to indeterminacy. H. L. A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 1, 6–7 (1983) [hereinafter HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*]. Hart's account of the judicial process here, however, used slightly more Dworkinian language than the account he provided in *Discretion*, perhaps reflecting Dworkin's influence on his later thinking. In the introduction to the *Essays in Jurisprudence and Philosophy*, Hart noted that "[v]ery often in deciding such [indeterminate] cases courts cite some general principle or general aim or purpose which a considerable area of the existing law can be understood as exemplifying or advancing," before rejecting the notion that this endeavor can render law fully determinate. *Id.* at 7.

⁴⁷ LACEY, *supra* note 16, at 179. For a magnificent account of Hart's year at Harvard, see *id.* at 179–208.

⁴⁸ *See id.* at 190 (quoting Interview by Michael Brock and Brian Harrison with H. L. A. Hart (1988)) (internal quotation marks omitted).

⁴⁹ Leslie Green, *Preface to the Third Edition* of HART, *THE CONCEPT OF LAW*, *supra* note 41, at xl, xl.

pressed in *Discretion* in the fall of 1956. In fact, Hart clearly had *Discretion* directly on hand when he drafted *The Concept of Law*: several passages from the essay appear nearly verbatim in the chapter addressed to “Formalism and Rule-Skepticism.”⁵⁰

Hart’s *Discretion*, therefore, is part of our jurisprudential heritage — part of the history of process theory, of analytical positivism, and of jurisprudence since. The present Essay aims to make sense of *Discretion* — to revisit its context, analyze its arguments, and interpret its significance. Part I situates the Legal Philosophy Discussion Group, and Hart’s participation, in historical and theoretical context, sketching a basic outline of process theory and illustrating Hart’s growing interest in American legal thought. Part II analyzes the content of Hart’s essay, providing a sympathetic reconstruction and interpretation of his ideas and drawing attention to connections between Hart’s analysis and the views of the process theorists. While there will no doubt be other valid interpretations of Hart’s arguments, this Essay interprets *Discretion* in light of the Process School in an attempt to remain faithful to the historical circumstances of *Discretion* and the perspective of Hart’s audience. Part III assesses the significance of the essay in light of other contributions to the discussion group and in light of the criticisms of Hart’s jurisprudence leveled by Fuller and Dworkin. *Discretion* clarifies Hart’s positions and helps us interpret important aspects of subsequent jurisprudential history. Accompanying this Essay is Hart’s *Discretion* itself — finally in print for the first time.

I. SETTING THE SCENE: H. L. A. HART AND PROCESS THEORY PRE-1956

A. *The Process Ethos*

In the late 1930s and early 1940s, a group of American professors developed a new approach to legal scholarship as an improvement on and replacement for legal realism.⁵¹ The new “process” approach aimed to capture the institutional reality of the post–New Deal admin-

⁵⁰ See HART, *THE CONCEPT OF LAW*, *supra* note 41, at 124–54. In notes to the analysis below, I try to indicate which passages from the *Discretion* paper found their way into *The Concept of Law*.

⁵¹ See generally DUXBURY, *supra* note 7, at 207–99; HORWITZ, *supra* note 7, at 247–68; 11 GERALD J. POSTEMA, *A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE* (2011); Barzun, *supra* note 16; Eskridge & Frickey, *supra* note 1; Purcell, *supra* note 37; G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973). Although these and other scholars have sometimes drawn attention to different aspects of process theory and therefore characterized the movement slightly differently, the major themes stand out in each account.

istrative state while placing central importance on antifascist, anti-communist values. The New Deal called for a theory of law that could make sense of the complexity of regulatory government.⁵² Concurrently, the specters of fascism in Germany and Italy and of communism in the Soviet Union demanded a legal theory that reflected the values of a free society — a theory that showed how a complex administrative state could be “lawlike and legitimate.”⁵³

Simply stated, the new “[p]rocess theorists”⁵⁴ directed their study to decisionmaking processes — the proliferation of which characterized post-New Deal government, the dismantling of which contributed to the consolidation of power in foreign dictatorships, and the integrity of which could anchor the concept of justice in a pluralistic society. Process theorists set out, first, to ask how legal decisions are made and which officials or institutions should make them, and second, to use the study of “comparative institutional analysis”⁵⁵ to infer normative requirements binding legal officials.⁵⁶

1. *Purposive Law and the Fact-Value Distinction.* — At the most basic level, process theorists understood government as a tool to solve society’s problems. In *The Legal Process*, (Henry) Hart and Sacks characterized law as “a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”⁵⁷ The law, defined as a “purposive . . . activity”⁵⁸ undertaken to solve the problems of community life, was conceptually inseparable from the goals and aspirations that motivated it.⁵⁹

The purposive approach to law was part of a broader intellectual trend toward an integration of fact and value. At that time, as Barzun points out, intellectuals working “[i]n philosophy, the natural sciences,

⁵² White, *supra* note 51, at 280–86. See generally Eskridge & Frickey, *supra* note 1. Many of the process theorists, including Henry Hart, worked in or had close ties to the Roosevelt Administration.

⁵³ Eskridge & Frickey, *supra* note 1, at 2048; see also *id.* at 2048–49. For information on the foreign dimension, see generally HORWITZ, *supra* note 7, at 250–52; and Purcell, *supra* note 37.

⁵⁴ Barzun, *supra* note 16, at 11.

⁵⁵ Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2123 (2003).

⁵⁶ This is a simplified explanation. I do not attempt to analyze the intellectual origins of process theory in detail or to take a position in the debates surrounding the movement’s rise. For excellent discussions, see DUXBURY, *supra* note 7, at 205–301; 11 POSTEMA, *supra* note 51; Barzun, *supra* note 16; Eskridge & Frickey, *supra* note 1; Purcell, *supra* note 37; Sebok, *supra* note 29; and White, *supra* note 51.

⁵⁷ Eskridge & Frickey, *supra* note 1, at 2042 (quoting HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 166 (tent. ed. 1958)) (internal quotation mark omitted).

⁵⁸ See LON L. FULLER, *LAW IN QUEST OF ITSELF* 11 (1940) (“In the field of purposive human activity, which includes both steam engines and the law, value and being are not two different things, but two aspects of an integral reality.”); HART & SACKS, *supra* note 23, at 166; Eskridge & Frickey, *supra* note 1, at 2042.

⁵⁹ See Eskridge & Frickey, *supra* note 1, at 2042–43.

and the social sciences . . . were beginning to question the possibility and profitability of rigidly separating questions of fact from questions of value.”⁶⁰ Fuller had led the campaign to reunite facts and values in legal theory since the early 1940s starting with his book *Law in Quest of Itself*,⁶¹ in which he argued that it is impossible to define law, or to say anything adequate about it, without reference to its value-laden aims. For Fuller, law is a “striving,” something teleological; what law *is* could not be understood except as something ever “in quest of itself” — ever in quest, that is, of its very *best* self. Henry Hart — with whom Fuller formed a “mutual admiration society”⁶² — picked up the same theme in 1951, remarking: “Law as it *is* is a continuous process of *becoming*. If morality has a place in the ‘becoming,’ it has a place in the ‘is.’”⁶³

The purposive approach to law and the integration of fact and value lay at the core of the process theorists’ reaction to legal realism. In their view, one of realism’s principal flaws was its insistence on the fact-value distinction. Henry Hart’s 1963 Holmes Lectures,⁶⁴ for example, argued that the fact-value separation “would condemn any legal theory to futility since we would not then be able to decide whether decisions were sound, who ought to make them, or what values they should reflect.”⁶⁵ The lectures were, in Professor Philip Bobbitt’s words, Henry Hart’s “*cri de coeur* against legal realism.”⁶⁶

2. *Dynamic Institutionalism and Reasoned Elaboration.* — Another problem with realism was its failure to develop a theory that could direct and harmonize the actions of different organs of government. Process theorists aimed to make sense of the complexity of modern government by asking, in Professor Akhil Amar’s words, “who is, or ought, to make a given legal decision, and how that decision is, or ought, to be made.”⁶⁷ Accordingly, process theorists developed a theory of institutional competence as they tried to determine how different

⁶⁰ Barzun, *supra* note 16, at 48.

⁶¹ FULLER, *supra* note 58; see also KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER 28–32 (2012).

⁶² Dorf, *supra* note 25, at 921 (quoting Eskridge & Frickey, *supra* note 23, at lxxxiii) (internal quotation marks omitted). Dorf goes on to suggest that Henry Hart drifted away from Fuller’s jurisprudential view in later years, moving closer to H. L. A. Hart’s positivism.

⁶³ Henry M. Hart, Jr., Comment, *Holmes’ Positivism: An Addendum*, 64 HARV. L. REV. 929, 930 (1951).

⁶⁴ Barzun notes that this lecture reiterated ideas in *The Legal Process* only “with some slight modifications.” Barzun, *supra* note 16, at 18.

⁶⁵ PHILIP BOBBITT, CONSTITUTIONAL FATE 56 (1982).

⁶⁶ *Id.*

⁶⁷ Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 691 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1988)).

tasks should be allocated to different institutions. “Legal scholars could examine courts, legislatures, administrative agencies, executives, juries, etc.,” Professor Guido Calabresi writes, “and shed light on the particular attributes of each of these that would make a given institution especially suited to decide some issues rather than others.”⁶⁸

Legislatures, agencies, and organs of the executive branch might be well suited, in terms of expertise and democratic mandate, to make policy determinations — but process theorists believed that *courts* are uniquely capable of resolving disputes in accord with reason and principle. This observation yielded a simple normative standard: judges should respect that some problems are best resolved by other institutions, and settle the problems for which courts are indeed the appropriate forum according to a method that reflects courts’ special abilities. Judicial decisions should be rational, they should appeal to general principles rather than to policy preferences, and they should be faithfully explained in writing. When legal rules fail to determine an outcome for a case, forcing a judge to “make” law, the judge should perform a “reasoned elaboration”⁶⁹ of existing law, rationally extending it until the case is resolved.

Further, because law is inherently purposive, reasoned elaboration requires an effort to further law’s *goals* — not just the general goals of the legal order as a whole, but also the specific goals of the individual laws in question. As a corollary of their basic purposive stance, Hart and Sacks held that “every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or agree exactly how it should be phrased,”⁷⁰ to imbue it with meaning. Reasoned elaboration aims to clarify and vindicate such purposes.

The theory of reasoned elaboration solved two problems: it justified the judicial function and constrained it. The theory carved out a space for judges in the post–New Deal administrative state, providing a positive guide for the contribution of courts to the dynamic legal system as

⁶⁸ Calabresi, *supra* note 55, at 2123. It is also worth noting that the concept of comparative competence appears on several levels within the process paradigm, revealing a recursive structure to the process-theoretic system of thought. In the process *weltanschauung*, the comparative advantage of lawyers in a professional society (lawyers are skilled in designing and coordinating decisionmaking processes) and the comparative advantages of different jobs within the legal profession (professors are uniquely positioned to criticize the performance of courts) are important in addition to the comparative competence of different institutions within the legal process.

⁶⁹ HART & SACKS, *supra* note 23, at 147 (emphasis omitted); *see also id.* at 162–71.

⁷⁰ *Id.* at 148. It is important to note that Hart and Sacks seemed to have in mind a particular attitude toward purposes, the identification of which should not take place “in the mood of a cynical political observer, taking account of all the short-run currents of political expedience that swirl around any legislative session. It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.” *Id.* at 1378.

a whole. Simultaneously, the theory ensured that the power of courts was limited by demanding that judges defer to other institutions where appropriate, and by insisting that judicial decisions be transparent, rational, and rooted in purpose. As Professor Richard Fallon writes, “while the judicial role is irreducibly creative in some respects, it is limited to the reasoned elaboration of principles and policies that are ultimately traceable to more democratically legitimate decisionmakers.”⁷¹

Set in post-realist context, the theory of reasoned elaboration was a significant accomplishment. Process theorists could maintain that legal indeterminacy poses little threat to the rule of law, as long as indeterminacy is resolved in the right manner. Limited judicial lawmaking constrained by the obligation of reasoned elaboration is in fact part of the social and institutional equilibrium that results from the right institutions soundly carrying out the right tasks — part of the rule of law itself.⁷²

3. *The Golden Age*. — Process theory “achieved consensus status after the war.”⁷³ “Beginning in 1951, the *Harvard Law Review* initiated the practice of inviting legal scholars to write Forewords to its analysis of the Supreme Court’s work for the preceding term.”⁷⁴ The Forewords reflected a collective effort to hold the Supreme Court to the standards of reasoned elaboration. “Early Forewords decried the Vinson Court’s tendency to dispose of cases without giving any reasons at all,”⁷⁵ and Sacks’s Foreword for the 1953 term expressed concern about the overuse of “per curiam opinions in which the reasons for the decision are either entirely omitted or set forth in a few sentences.”⁷⁶ In 1953, Henry Hart and Wechsler published one of the movement’s most “defining” casebooks, *The Federal Courts and the Federal System*.⁷⁷ And throughout the 1950s, (Henry) Hart and Sacks continued to edit and refine the materials that would become *The Legal Pro-*

⁷¹ Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 966 (1994).

⁷² As Professor Laura Kalman observes, “[o]nce the legal realists had questioned the existence of principled decision making, academic lawyers spent the rest of the twentieth century searching for criteria that would enable them to identify objectivity in judicial decisions.” KALMAN, *supra* note 11, at 5.

⁷³ Eskridge & Frickey, *supra* note 1, at 2049.

⁷⁴ White, *supra* note 51, at 286.

⁷⁵ *Id.*

⁷⁶ Albert Sacks, *The Supreme Court, 1953 Term — Foreword*, 68 HARV. L. REV. 96, 99 (1954). Overall, “the authors of successive Forewords gradually expanded and sharpened the focus of their critique,” pursuing the “Reasoned Elaborationist” agenda with greater and greater clarity. White, *supra* note 51, at 286.

⁷⁷ For an excellent history of Hart and Wechsler’s casebook and an insightful interpretation of its significance and “defining” place in process theory, see Amar, *supra* note 67.

cess,⁷⁸ at that point still an assortment of educational materials first compiled before World War II.⁷⁹ Process theory had reached its “golden age.”⁸⁰

Soon, however, process theorists found themselves racing to keep up with a changing political landscape. After 1954, the question of how to understand *Brown v. Board of Education* loomed large.⁸¹ For legal theorists, the landmark decision called not just for a theory of how courts could contribute to “a dynamic, problem-solving government that is also lawlike and legitimate,”⁸² but also for a theory of when and how courts could override electoral majorities in pursuit of substantive justice, effecting “policy change with nationwide impact”⁸³ to build a more inclusive democracy. The Process School’s most significant ideas — the purposive approach to law, institutional competence, and reasoned elaboration — had emerged as political change drew attention to realism’s shortcomings. But now, political change was beginning to draw attention to *process theory’s* shortcomings.⁸⁴ The process theorists were strong supporters of civil rights, and they were committed to desegregation.⁸⁵ By and large, they were political liberals. But *Brown* suggested a much more potent role for courts than the process theorists had envisioned. And even though the process theorists likely agreed with *Brown’s* result, it was not clear if the

⁷⁸ For a meticulously researched and extremely illuminating documentary history of *The Legal Process* materials, see Eskridge & Frickey, *supra* note 23.

⁷⁹ Eskridge & Frickey, *supra* note 1, at 2042.

⁸⁰ Amar, *supra* note 67, at 691.

⁸¹ KALMAN, *supra* note 11, at 5–6 (commenting on how *Brown* became an urgent concern for law professors).

⁸² Eskridge & Frickey, *supra* note 1, at 2047–48.

⁸³ KALMAN, *supra* note 11, at 2 (emphasis omitted).

⁸⁴ According to Dorf,

[Henry] Hart and Sacks assumed that the sorts of conflict that law was needed to resolve would occur principally along economic lines: management versus labor, producer versus consumer, and so forth. When new lines of conflict emerged — most prominently in the form of the Civil Rights movement and successor rights movements — it became clear that deference to one or another existing institutional settlement would pit substantive justice against the notion of a circumscribed judicial role. Issues of racial inequality had, of course, been central to the entire American experience, but it was not until the Warren Court that the vindication of the fundamental rights of citizens (other than property rights) came to be understood as a basic function of courts.

Dorf, *supra* note 25, at 930–31. As Amar explains, “*Brown* called into question every central tenet of the legal process theory embodied in the first edition of *The Federal Courts and the Federal System*,” which was released a year before the *Brown* decision. Amar, *supra* note 67, at 703. And in Eskridge and Frickey’s words, “[t]he prominence of civil rights on the nation’s public law agenda unraveled the intellectual consensus achieved during World War II, and hence undermined important conceptual foundations of *The Legal Process*” — namely, the notion that even though citizens might harbor deep disagreements about questions of value, they might nevertheless agree about how to decide what to do in national politics. Eskridge & Frickey, *supra* note 1, at 2049.

⁸⁵ See Eskridge & Frickey, *supra* note 1, at 2050 n.114.

opinion's superficially policy-oriented *reasoning* satisfied their demands of institutional competence and reasoned elaboration. The 1958 version of *The Legal Process* did not even *mention Brown* a single time; Hart and Sacks did not know what to say about it.⁸⁶

B. *The Arrival of H. L. A. Hart*

A few years earlier and an ocean away, H. L. A. Hart had embarked on a completely novel intellectual project at Oxford: combining the study of law with the latest form of analytic philosophy. Hart started his career as a philosopher after World War II at a time when Oxford philosophy was abuzz with a new form of linguistic analysis. Under the vigorous leadership of J. L. Austin, Hart's cohort of philosophers aimed to clarify concepts by studying the ordinary usage of words. Drawing on his prewar experience as a barrister, Hart saw the opportunity to make a distinct contribution to the movement by analyzing concepts in legal discourse: what is a right, or a duty, or an obligation, or even "law" itself? Hart explained a few years later that in legal philosophy, "it is particularly true that we may use, as Professor J. L. Austin said, 'a sharpened awareness of words to sharpen our awareness of the phenomena.'"⁸⁷ In 1952, Hart became Professor of Jurisprudence — the first time a philosopher had assumed that position — and devoted himself full time to his new style of linguistically informed analytic jurisprudence.⁸⁸

The process theorists were watching closely. In the spring of 1955, Lon Fuller, the most philosophically minded of the process theorists, proposed that Harvard invite Hart to spend a year in Cambridge as a visiting professor.⁸⁹ Harvard's process-mania had spurred an interest in what other forms of legal theory might contribute to the process

⁸⁶ The relationship between process theory and the Warren Court's race cases became an explosive issue by the end of the decade. See generally LEARNED HAND, *THE BILL OF RIGHTS* (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Eskridge and Frickey note that Wechsler developed the ideas for *Neutral Principles* while participating in the Legal Philosophy Discussion Group. Eskridge & Frickey, *supra* note 1, at 2048; see also WILLIAM M. WIECEK, *THE BIRTH OF THE MODERN CONSTITUTION* 458–59 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Vol. 12, 2006).

⁸⁷ HART, *THE CONCEPT OF LAW*, at vii (1961) (quoting J. L. Austin, *A Plea for Excuses: The Presidential Address*, 57 PROC. ARISTOTELIAN SOC'Y 1, 8 (1957)). Interestingly, Hart's quotation omitted a qualification in Austin's original text, which read, "[W]e are using a sharpened awareness of words to sharpen our perception of, though not as the final arbiter of, the phenomena." Austin, *supra*, at 8. Hart's trimmed version suggests that he may have been even more bullish than Austin on the power of linguistic analysis to elucidate reality.

⁸⁸ For a detailed narrative of Hart's career between 1945 and 1956, see LACEY, *supra* note 16, at 112–78.

⁸⁹ Untitled Memorandum from Lon L. Fuller, Professor of Law, Harvard Law Sch. (undated) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 14) [hereinafter *Untitled Memorandum from Lon L. Fuller*].

generation's project,⁹⁰ and although Hart's form of linguistic analysis was "far from congenial"⁹¹ at Harvard, Fuller was eager to engage with it, recognizing — cautiously — that linguistic philosophy represented a significant advance over previous movements in the analytic tradition and could prove influential among American scholars.⁹² Fuller equally envisioned Hart "taking back to England a real understanding of the currents of legal thought in this country."⁹³ Fuller hoped that Hart would become invested in American problems and direct his philosophical powers to them.

1. *Hart's Early Interest in American Legal Thought.* — Hart eagerly accepted Harvard's invitation. His interest in the United States was already deepening. Starting in the early 1950s, Hart nursed a growing fascination with American legal thought — an interest that led him to devour American jurisprudence, teach it at Oxford, and publish several articles in American journals. He was sufficiently engaged with American intellectual life by the time he arrived at Harvard in the fall of 1956 that he was already established as a transatlantic legal figure.

In fact, Hart had visited the United States once before, in 1952, when he attended a conference on "legal and political philosophy" just outside New York City.⁹⁴ The conference's short guest list included leading American legal and political figures.⁹⁵ Presiding over the conference was Dean Rusk, future U.S. Secretary of State and newly appointed President of the Rockefeller Foundation, which sponsored the conference. It was the first occasion on which Hart encountered Fuller — whom he would meet many times again — as well as a number of other jurisprudential figures, including Edward Levi, Jerome Hall, and Hessel Yntema. Following the conference, Yntema invited Hart to write an essay comparing postwar jurisprudence in Britain and America for *The American Journal of Comparative Law*, a new publication Yntema had founded the year before.⁹⁶ The essay Hart wrote reflected his growing interest in the United States.⁹⁷ He

⁹⁰ See LACEY, *supra* note 16, at 184.

⁹¹ Lacey, *supra* note 40, at 640.

⁹² See Untitled Memorandum from Lon L. Fuller, *supra* note 89.

⁹³ *Id.* at 1.

⁹⁴ See List of Addresses of the Participants in the First Conference on Legal and Political Philosophy, Arden House, October 31 to November 3, 1952 (undated) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 5).

⁹⁵ See *id.*

⁹⁶ Yntema probably invited Hart to write the article at the conference or shortly thereafter. See generally Vera Bolgár, *The American Journal of Comparative Law 1952–1966*, 15 AM. J. COMP. L. 21, 24 (1967) (discussing Yntema's role in founding the journal and the early years of his editorship); *In Memoriam: Hessel E. Yntema*, U. MICH. L. QUADRANGLE NOTES, Spring 1966, at 7.

⁹⁷ See H. L. A. Hart, *Philosophy of Law and Jurisprudence in Britain (1945–1952)*, 2 AM. J. COMP. L. 355 (1953) [hereinafter Hart, *Philosophy of Law and Jurisprudence*].

compared the structure of the legal professions, the styles of legal education, and the forms of thought that prevailed in the two countries, suggesting that analytic jurisprudence would be a permanent fixture of English legal thought, but at the same time implying clearly that American approaches were worthy of careful study.⁹⁸

Full of energy, Hart returned to England and launched an Americanization campaign. To start, he began to modify the Oxford jurisprudence curriculum to include more American writers, encouraging his students to read Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo, John Chipman Gray, and Wesley Newcomb Hohfeld.⁹⁹ Hart also shifted the emphasis of Oxford's jurisprudence examinations toward American thought. Students sitting for their jurisprudence exams in 1953, the first year after Hart took the curricular reins, were invited to analyze a quotation from Pound about the function of economics in law.¹⁰⁰ Christopher Columbus Langdell appeared on the examination in 1954,¹⁰¹ and in 1955, students confronted questions like "What is sociological jurisprudence?"¹⁰² and "Is a right merely the correlative of a duty?"¹⁰³ a question referring to Hohfeld, an American

⁹⁸ See *id.*

⁹⁹ See *id.* at 358. This inference is drawn from the difference between the list of recommended reading appearing in Hart's article and Oxford's official reading list. What is noteworthy about Hart's list is that it reproduced exactly the official list of recommended reading in the Oxford *Examination Statutes*, but added four American texts — a revision that reflects Hart's growing interest in American thought and his belief that American writers were of jurisprudential significance even for Oxford undergraduates. See AW BRIAN SIMPSON, REFLECTIONS ON *THE CONCEPT OF LAW* 53–54 (2011).

¹⁰⁰ Oxford Univ. Honour Sch. of Jurisprudence, 1953 Trinity Term Examination Paper q.11 (on file with the Bodleian Law Library, University of Oxford). Compare with the pre-Hart exams: In 1949, students were asked: "To what extent is the Court of Appeal bound by precedents?" Oxford Univ. Honour Sch. of Jurisprudence, 1949 Trinity Term Examination Paper q.2 (on file with the Bodleian Law Library, University of Oxford). Students sitting for their final exams in 1950 were invited to comment on specific quotations from Jeremy Bentham and John Austin, and were asked general questions making direct reference to Austin's theories, such as "Do you regard enforcement as an essential element in the definition of law?" Oxford Univ. Honour Sch. of Jurisprudence, 1950 Trinity Term Examination Paper q.4 (on file with the Bodleian Law Library, University of Oxford). In 1951, students were asked to comment on a quotation from Sir Thomas Holland, a prominent nineteenth- and early twentieth-century English jurist, Oxford Univ. Honour Sch. of Jurisprudence, 1951 Trinity Term Examination Paper q.8 (on file with the Bodleian Law Library, University of Oxford), and in 1952, students were invited to compare Bentham's utilitarian theory with the historical approach, Oxford Univ. Honour Sch. of Jurisprudence, 1952 Trinity Term Examination Paper q.10 (on file with the Bodleian Law Library, University of Oxford).

¹⁰¹ Oxford Univ. Honour Sch. of Jurisprudence, 1954 Trinity Term Examination Paper q.6 (on file with the Bodleian Law Library, University of Oxford).

¹⁰² Oxford Univ. Honour Sch. of Jurisprudence, 1955 Trinity Term Examination Paper q.7 (on file with the Bodleian Law Library, University of Oxford).

¹⁰³ *Id.* at q.5.

theorist in whom Hart was particularly interested.¹⁰⁴ The 1956 exam asked whether “the pith and substance of American realist jurisprudence” could “be conveniently stated in a short paragraph” and invited students to “[e]stimate the importance of this jurisprudential approach.”¹⁰⁵

2. *Hart's Early Critique of Realism.* — As Hart was asking his students to “estimate the importance” of the realist “approach,” he was developing a critique of realism himself. Hart’s inaugural lecture, delivered to mark the beginning of his tenure as Professor and later published as *Definition and Theory in Jurisprudence*,¹⁰⁶ revealed the early stages of antirealist thought that would find mature expression in Hart’s later work.¹⁰⁷ In his inaugural lecture, Hart did not launch an exhaustive attack on realism, but he did object immediately to the realists’ prediction theory of law: the view that law is nothing more than a prediction of what officials will do. For Hart, abstract legal concepts should be defined with reference to the ordinary meaning of the terms used to denote them, not with reference to a future state of affairs.¹⁰⁸ Pressing further, the essay he wrote for Yntema the next year proposed a counterexample to the prediction theory: In England, he observed, courts are less powerful than they are in the United States; English

¹⁰⁴ Hart developed an early interest in Hohfeld, who deployed a form of analysis to investigate the function of law in practice that would have appealed to Hart’s linguistic sensibilities. Although they disagreed on many points, Hart found in Hohfeld a forerunner to his own linguistically focused analytical jurisprudence. Hart’s inaugural lecture lauded parts of Hohfeld’s theory of corporations (a theory expressed “with a requisite degree of subtlety,” Hart said), though ultimately disagreeing with it, and praised Hohfeld for his attention to linguistic detail. H. L. A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37, 54 (1954) [hereinafter Hart, *Definition and Theory in Jurisprudence*], reprinted in HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY, *supra* note 46, at 21, 41. Hart devoted two lengthy footnotes in his inaugural lecture to discussion of Hohfeld’s work, explaining and charitably extending Hohfeld’s theories, before ultimately expressing his disagreement. *Id.* at 35 n.15, 42 n.22. Hart’s interest in Hohfeld would grow: in an essay published a few years later, he mentioned Hohfeld no fewer than five times, frequently mentioning him, alongside John Austin and the Austrian jurist Hans Kelsen, as one of his principal forerunners in the analytic tradition. H. L. A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953, 956–57, 959, 970 (1957) [hereinafter Hart, *Analytical Jurisprudence*].

¹⁰⁵ Oxford Univ. Honour Sch. of Jurisprudence, 1956 Trinity Term Examination Paper q.7 (on file with the Bodleian Law Library, University of Oxford).

¹⁰⁶ Hart, *Definition and Theory in Jurisprudence*, *supra* note 104.

¹⁰⁷ See, e.g., HART, THE CONCEPT OF LAW, *supra* note 41, at 121–50.

¹⁰⁸ How, he asked, would a realist define a “right”? “[T]he American Realists,” Hart wrote, “striving to give us an answer in terms of plain fact tell us that a right is a term by which we describe the prophecies we make of the probable behaviour of courts or officials.” Hart, *Definition and Theory in Jurisprudence*, *supra* note 104, at 39. Hart immediately recognized this as an implausible way to define a legal term. *Id.* Hart’s footnote at this point went to Walter Wheeler Cook, but Hart was referring to a general view that dates back to Holmes. *Id.* at 39 n.3. In general, Hart held a caricatured view of American legal realism. See generally E. Hunter Taylor, Jr., *H. L. A. Hart's Concept of Law in the Perspective of American Legal Realism*, 35 MOD. L. REV. 606 (1972), for more on how Hart distorted the realists’ approach.

courts are responsible only for a small portion of the law, and even for that small portion they do not have the final say. How then, Hart asked, could law itself — not just American law — be defined as the prediction of what courts will do? “There are, I think, no ‘legal realists’ in England in the American sense of these words,” Hart wrote.¹⁰⁹ “For important as the courts are, they have never appeared so important or so free in their operation as to make plausible the contention that law is merely a prediction of what the courts will do”¹¹⁰ Realism, in Hart’s assessment, partly grew out of a collective American obsession with the judiciary.

Although Hart rejected the definitional foundations of realism, he was more sympathetic to the realists’ view of legal reasoning. “[T]he American Realist theories,” he wrote, “have much to tell us of value about the judicial process and how small a part deduction from predetermined premises may play in it.”¹¹¹ Hart agreed with the realists’ claim that judges sometimes “make” rather than merely “find” law, and he admired realism’s critique of formalism and “mechanical jurisprudence.”¹¹² In 1953, Hart admonished legal scholars to “emancipate themselves finally from the notion that deductive proof exhausts the notion of reasoning which has inspired both dogmatic obscurity and sceptical extravagance in the past.”¹¹³

Most importantly, though, Hart found fault with the realists for failing to separate their insights into adjudication from definitional claims about the nature of law. This theme would return strongly in *Discretion*, as Hart assessed the consequences of purposive analysis in legal reasoning.¹¹⁴ In Hart’s estimation, the realists were too quick to leap from the existence of judicial choice to the prediction theory of law. Realism painted an important picture of judicial behavior, Hart wrote, but “the lesson is blurred when it is presented as a matter of definition of ‘law.’”¹¹⁵ In other words, Hart saw an important difference between an epistemic theory of legal reasoning and an ontological theory of law — a distinction he thought the realists had overlooked.

Clear distinctions mattered to Hart. His guiding belief was that analytic philosophy — proceeding with careful distinctions, logical rigor, linguistic analysis, and a rigid fact-value separation — could advance the study of jurisprudence by “elucidat[ing]” concepts” in legal

¹⁰⁹ Hart, *Philosophy of Law and Jurisprudence*, *supra* note 97, at 362.

¹¹⁰ *Id.* This insight into the relationship between institutional arrangements and legal philosophy offers a faint glimpse into Hart’s “path not taken,” foreshadowing the institutional analysis that reappeared in *Discretion* but receded from Hart’s mature work.

¹¹¹ Hart, *Definition and Theory in Jurisprudence*, *supra* note 104, at 40.

¹¹² *See id.*

¹¹³ Hart, *Philosophy of Law and Jurisprudence*, *supra* note 97, at 364.

¹¹⁴ *See, e.g.*, Hart, *Discretion*, *supra* note 12, at 665.

¹¹⁵ HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 46, at 25.

life, revealing the structures of power in society, and laying bare the moral choices citizens must make.¹¹⁶ Hart's hope was that the analytic method could make good on Jeremy Bentham's aspiration to "pluck the mask of Mystery from the face of Jurisprudence."¹¹⁷ In temperament, therefore, Hart was sympathetic to realism's demystifying aims. He respected iconoclasm. He admired Bentham over Blackstone, Llewellyn over Langdell.¹¹⁸ But Hart demanded a level of philosophical rigor that realism, in his assessment, lacked.

3. *Hart's Newfound Trajectory.* — Not surprisingly, it was Hart's philosophical methodology that set him most at odds with his American contemporaries in advance of his year at Harvard. Hart's analytical approach conflicted with prevailing American approaches to legal scholarship (including process theory), which preferred institutional to conceptual analysis and insisted on a fact-value fusion. This tension flared up three months before Hart arrived at Harvard when Edgar Bodenheimer, an American professor sympathetic to, though not directly part of, the Process School, sharply criticized Hart's focus on analytical, as opposed to sociological, jurisprudence, arguing that Hart's philosophical approach was of little value to education or theory.¹¹⁹ For Bodenheimer, Hart's analytical jurisprudence constituted an endorsement of legal formalism — the outdated, conservative *ancien regime* of American legal thought.¹²⁰ He declared that Hart "does not advocate going outside the boundaries of pure legal reasoning, apparently believing that law is a self-contained science."¹²¹ At the same time, Bodenheimer described Hart as a "radical positivist,"¹²² a stinging critique in postwar America. Positivism was anathema to postwar scholars partly because it involved the fact-value distinction, and all of its problems, and also because it called back to legal realism, and all of

¹¹⁶ For Hart, the conceptual separation between law and morality was not just an element of philosophical methodology. It was also a precept aiming at a liberal ideal. "[His] implication [was] that things will turn out better, in terms of resistance to tyranny, if citizens understand that there are always two separate questions to be confronted: [F]irst, is this a valid rule of law? Second, should it be obeyed?" LACEY, *supra* note 16, at 198–99.

¹¹⁷ JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 410 (J. H. Burns & H. L. A. Hart eds., 1977).

¹¹⁸ For this apt alliteration, see GRANT GILMORE, THE AGES OF AMERICAN LAW 68 (1977).

¹¹⁹ See Bodenheimer, *supra* note 5, at 1085.

¹²⁰ See, e.g., Sebok, *supra* note 29, at 2068–72 (discussing associations between analytical jurisprudence, classical positivism, and formalism). Hart's American readers may have believed there was a connection between "conceptual analysis" and "conceptualism," a term linked with legal formalism. See, e.g., *id.* at 2071.

¹²¹ Bodenheimer, *supra* note 5, at 1080. The connection established an implicit link between Hart's jurisprudence and the laissez-faire classical liberalism of the formalist era — an association that would have been particularly troubling for Hart, a left-leaning liberal. See DUXBURY, *supra* note 7, at 9–64 (discussing the connections between formalism and laissez-faire liberalism).

¹²² Bodenheimer, *supra* note 5, at 1083.

its problems.¹²³ Positivism amounted to a rejection of the post-realist understanding of law as a “purposive activity” undertaken to realize social goals, and an endorsement of the realist understanding of law as power. Hart himself understood the taboo against positivism all too well: “The word ‘positivist’ had a tremendously evil ring [at Harvard],” Hart recalled.¹²⁴ “I remember hearing somebody say, ‘You know he’s a positivist, but he’s quite a nice man.’”¹²⁵

Hart believed — correctly — that Bodenheimer had plainly misread his work.¹²⁶ But Bodenheimer’s critique is important in two respects. First, it helps to reveal how Hart’s new jurisprudence was being received in America in advance of his arrival. It did not go over well: Hart’s approach looked like the devil *and* the deep blue sea. On the one hand, “analytical jurisprudence” and Hart’s emphasis on “conceptual analysis” harkened back to the worst of legal formalism. On the other hand, by insisting on a separation of fact from value, Hart called to mind the worst of valueless legal realism and invited criticism rooted in the pejorative connotations of “positivism.” Second, Bodenheimer’s critique influenced Hart’s intellectual trajectory. In response, Hart grew determined to clarify his ideas and more firmly distinguish his position from formalism and realism. Bodenheimer’s accusation that Hart was everything the Legal Process School was not had the ironic effect of pushing Hart’s agenda into striking harmony with process theory. The critique, Hart wrote, “stirred me from dogmatic slumbers.”¹²⁷

Perhaps because the web of connotations was so fraught, Hart returned repeatedly during his year at Harvard to the task of clarifying the true relationship between positivism, formalism, and realism. In his Holmes Lecture, delivered at the end of his visit, Hart would reclaim the moniker “positivism,” distinguish it from both formalism and realism, and defend the fact-value separation as an element of liberal legal thought.¹²⁸ It was a synthetic statement of his jurisprudence that would bring him lasting fame. But at the beginning of his year at Harvard, Hart was just starting to refine these ideas. When he board-

¹²³ Sebok, *supra* note 29, at 2095–99 (commenting on associations between realism and positivism in the postwar period).

¹²⁴ David Sugarman, *Hart Interviewed: H. L. A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC’Y 267, 279 (2005).

¹²⁵ *Id.*

¹²⁶ Hart, *Analytical Jurisprudence*, *supra* note 104, at 953.

¹²⁷ *Id.* (referring obviously to IMMANUEL KANT, PROLEGOMENA: TO ANY FUTURE METAPHYSICS THAT CAN QUALIFY AS A SCIENCE 7 (Paul Carus trans., Open Court Publ’g Co. 1988) (1783) (“I openly confess, the suggestion of David Hume was the very thing, which many years ago first interrupted my dogmatic slumber, and gave my investigations in the field of speculative philosophy quite a new direction.”)).

¹²⁸ See Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37.

ed the Queen Elizabeth in September of 1956 and set sail for the United States,¹²⁹ he was embarking on an intellectual odyssey, searching for a philosophically rigorous middle way between formalism and realism — extremes he would later call the “Scylla and Charybdis”¹³⁰ of American legal thought. He shared with process theory a common project. Hart and the process theorists were charting similar courses through the same intellectual history.¹³¹ Both dismissed legal formalism as hopelessly outdated and plainly false. Both rejected the theoretical foundations of legal realism while accepting indeterminacy and remaining sympathetic to the project of progressive reform. And most importantly, both faced moments of reckoning. Hart’s jurisprudence required fresh articulation in light of American misunderstandings. And process theory — still holding “consensus status”¹³² — needed to “com[e] to grips with . . . *Brown v. Board of Education*.”¹³³

C. *The Legal Philosophy Discussion Group*

Thus, H. L. A. Hart arrived at Harvard at a moment of peculiar intellectual intensity — a moment when the process movement was near the apex of its “golden age”¹³⁴ yet simultaneously shaken by the legal upheaval of the fifties, and a moment when Hart himself was beginning to find his voice. The year that followed would be an *annus mirabilis* in the history of legal theory. (Henry) Hart and Sacks neared completion of the final “tentative” edition of *The Legal Process* materials.¹³⁵ Fuller presented the first draft of his classic article *The Forms and Limits of Adjudication*,¹³⁶ which was widely read but formally unpublished until after his death. Wechsler developed the key ideas that he would later publish as *Toward Neutral Principles of Constitutional Law*,¹³⁷ an article that would become famous — perhaps infamous — for setting process theory at odds with the Court’s reasoning in *Brown*. This was also the year when H. L. A. Hart “developed or laid the foundations for the vast majority of his work over the next

¹²⁹ LACEY, *supra* note 16, at 179.

¹³⁰ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 147.

¹³¹ It is important to remember, as Lacey (in her introductory Essay) points out, that Hart drew his “primary [philosophical] resources” from English empiricist philosophy. Lacey, *supra* note 40, at 639. By the same token, the process theorists were engaging with a wide variety of American philosophical theories, notably pragmatism and contemporary social theory. See generally Barzun, *supra* note 16 (examining the intellectual foundations of *The Legal Process* materials). Still, Hart and the process theorists found themselves with similar projects in 1956.

¹³² Eskridge & Frickey, *supra* note 1, at 2049.

¹³³ Amar, *supra* note 67, at 703.

¹³⁴ *Id.* at 691.

¹³⁵ Eskridge & Frickey, *supra* note 1, at 2048.

¹³⁶ Fuller, *supra* note 17.

¹³⁷ Wechsler, *supra* note 86. Eskridge and Frickey note that Wechsler formulated his key ideas for that article at Harvard in 1956–1957. Eskridge & Frickey, *supra* note 1, at 2047–48.

decade.”¹³⁸ In the spring, Hart delivered his famous Holmes Lecture, *Positivism and the Separation of Law and Morals*, provoking a response from Fuller and kicking off the storied Hart-Fuller debate.¹³⁹ The *Harvard Law School Bulletin* declared 1956–1957 “Harvard’s Jurisprudence Year.”¹⁴⁰ By one professor’s count, the faculty offered six different legal philosophy courses for students.¹⁴¹ Perhaps most importantly, a new faculty seminar — the Legal Philosophy Discussion Group — became a critical forum for the development of process theory and analytical positivism alike.

Near the beginning of the fall semester, Freund, Fuller, and Henry Hart wrote to a few of their friends on the faculty to organize a faculty discussion group to address issues in legal philosophy.¹⁴² The trio “constituted themselves as an organizing committee” and reported that they had “coopted”¹⁴³ a small group, including Professors John Dawson, Carl Friedrich, and Morton White, and the three visiting Professors, H. L. A. Hart, Julius Stone,¹⁴⁴ and Wechsler, “to serve as fellow charter members” — the “founding fathers” of the group.¹⁴⁵ The “founding fathers” agreed to meet every two weeks at the Signet Society for dinner and discussion, and while they hoped other professors would participate, they decided that the invitation to the rest of the faculty “will be phrased in such terms as to discourage anything like a unanimous response. In particular, those who join will be asked to assume a serious commitment to become regular attendants at the meetings.”¹⁴⁶ They decided to devote the year’s discussion to “a single general topic”: “Administrative and Judicial Discretion.”¹⁴⁷

A few days later, on October 3, 1956, the “founding fathers” announced the group to the entire faculty, citing the opportunity to learn from H. L. A. Hart and the other visiting professors as a principal mo-

¹³⁸ LACEY, *supra* note 16, at 190.

¹³⁹ Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

¹⁴⁰ Samuel S. Shuman, *Harvard’s Jurisprudence Year*, HARV. L. SCH. BULL., Apr. 1957, at 8. Shuman lists seven seminars total, but one — the Legal Philosophy Discussion Group — was only for faculty. *Id.* at 18.

¹⁴¹ *Id.*

¹⁴² Memorandum from Paul Freund, Henry Hart, and Lon Fuller, Professors of Law, Harvard Law Sch., to the “Law School Discussion Group” 1 (undated) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7) [hereinafter Undated Memorandum to the Legal Philosophy Discussion Group].

¹⁴³ *Id.*

¹⁴⁴ Stone and H. L. A. Hart had a difficult relationship at Harvard. For more, see LACEY, *supra* note 16, at 189–90 (describing Hart’s uneasy relationship with Stone); and LEONIE STAR, JULIUS STONE 158–62 (1992).

¹⁴⁵ Undated Memorandum to the Legal Philosophy Discussion Group, *supra* note 142, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

tivation for the group's formation.¹⁴⁸ "As you know," they wrote, "we are fortunate in having as visitors this year a number of scholars distinguished in jurisprudence and related subjects. . . . [W]e should take advantage of the opportunity thus presented by organizing a group for the discussion of problems of legal philosophy."¹⁴⁹ Besides the nine "founding fathers," at least twenty professors joined: Professors Robert Braucher, Kingman Brewster, Ernest Brown, David Cavers, Abram Chayes, Archibald Cox, Charles Fairman, Charles Haar, David Herwitz, Mark DeWolf Howe, Louis Jaffe, Benjamin Kaplan, Milton Katz, Robert Keeton, Louis Loss, John McNaughton, Albert Sacks, Samuel Shuman, Donald Trautman, and Donald Turner.¹⁵⁰ Professors Erwin Griswold, Livingston Hall, and Stanley Surrey expressed interest but missed the first meeting.¹⁵¹

The organizers set out to construct an agenda for the year by determining "what special aspect of the problem of judicial and administrative discretion [was] of the greatest personal interest" to each participant.¹⁵² In the memorandum framing the first discussion, the organizers seemed particularly interested in how diverse forms of discretion are related to each other conceptually and functionally. "It may be suggested," they noted:

that the problem of "discretion" and its counterpart, "the rule of law," assume very different aspects depending upon:

- (1) the form of law, say, code law *v.* common law;
- (2) the area of law, say, commercial law *v.* criminal law;
- (3) the governmental function involved, say, adjudication of a dispute by a court of equity *v.* . . . equity receivership; and
- (4) whether the agency of government is charged with perfecting a market . . . or laying down the rules for a regime of bargaining . . . on the one hand, or, on the other, supplanting a market . . . or taking over some of the functions of a market¹⁵³

¹⁴⁸ Letter to the Members of the Law Faculty 1 (Oct. 3, 1956) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7). Again, the organizers reiterated that the Legal Philosophy Discussion Group was intended to be a serious academic commitment: "We are asking that those who join the group enter a firm commitment to subscribe to a kind of season ticket and to undertake whatever preparation may be required to permit them to participate actively in the discussions." *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Memorandum to the Members of the Legal Philosophy Discussion Group 1 (Oct. 8, 1956) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7) [hereinafter Oct. 8, 1956, Memorandum to the Legal Philosophy Discussion Group].

¹⁵¹ *Id.* This brought the total membership to as high as thirty-two — and not surprisingly for 1956, all of them men.

¹⁵² *Id.*

¹⁵³ *Id.*

This initial memorandum, setting the tone for the year, offers several insights about the group and its members' interests. To start, it was clear that the organizers were captivated with economics — in particular, with how the regulatory state could partner with the invisible hand of the market to realize social goals, revealing in process theory an economic strand of Cold War liberalism.¹⁵⁴ It was also clear that the group took law's diversity seriously. They set out to investigate the workings of the whole legal system, looking beyond appellate adjudication to explore discretion in disparate parts of the law (for example, in administrative decisions and criminal sentencing as well as in statutory and constitutional interpretation).¹⁵⁵ The group's membership was particularly suited to this cross-functional study: in Henry Hart the group had an expert on legislation and statutory interpretation; in H. L. A. Hart and Fuller they had experts in general jurisprudence; and in Wechsler and Freund they had experts in constitutional adjudication.¹⁵⁶ The organizers hoped to synthesize different genres of legal scholarship to produce a comprehensive understanding of discretion. The memorandum further reveals that the group envisioned a connection between the "government function involved" and the way discretion is exercised,¹⁵⁷ gesturing to the well-established concept of institutional competence. Finally, the organizers posed "the problem of

¹⁵⁴ Many process theorists were alumni of the Roosevelt Administration and believed in the power of well-regulated but basically free markets as the path to growth and as a component of a free society. The initial reading packet of "hastily selected materials" that were "intended simply to serve as pump-priming" for the group's first, organizational meeting, *id.*, which would not feature an introductory talk from one of the participants, included *Planning and the Rule of Law*, an essay that originally appeared as chapter six of Friedrich A. Hayek's *The Road to Serfdom*, and an excerpt from another essay by Hayek entitled *Judicial and Administrative Discretion Under the Civil and Common Law Systems*, taken from a series of lectures Hayek had given the previous year entitled *The Political Ideal and the Rule of Law*. *See id.* at 2–9. For connections between economic theory and jurisprudence in this period, see generally POSTEMA, *supra* note 51, at 153–203.

¹⁵⁵ The rest of the initial reading packet reflected the group's attention to the diverse situations in which discretion arises and to the importance of bringing international and nonlawyerly perspectives to bear on the study of law. One essay, *Administrative Discretion and the Rule of Law*, was firmly rooted in legal sociology. *See* Oct. 8, 1956, Memorandum to the Legal Philosophy Discussion Group, *supra* note 150, at 9–18. Another, *On the Individuation of the Criminal Law*, brought criminal law to bear on the question of discretion. *See id.* at 18–20. An excerpt from Karl Llewellyn's essay (translated from Llewellyn's original German), *When Does the 'Application' of a Rule Involve an Extension of It*, and an excerpt from Yntema's *The Hornbook Method and the Conflict of Laws, On the Importance of General Principles to Control Decision*, presented issues of general jurisprudence. *See id.* at 20–21. The packet even included a snippet from Ludwig Wittgenstein's *Philosophical Investigations, On the Interpretation of a Directive*. *See id.* at 21. The final reading was an excerpt from Pound's *Justice According to Law*. *See id.* at 21–22.

¹⁵⁶ Eskridge and Frickey observe: "These authors were centrally concerned with the control of discretion — Hart and Sacks at the retail level of statutory and common law interpretation, Wechsler at the wholesale level of constitutional law, and Fuller at the meta-level of jurisprudence." Eskridge & Frickey, *supra* note 1, at 2048.

¹⁵⁷ Oct. 8, 1956, Memorandum to the Legal Philosophy Discussion Group, *supra* note 150, at 1.

‘discretion’” and “the rule of law” as “counterpart[s].”¹⁵⁸ In their view, a satisfactory solution to the problem of discretion was important to the conceptual integrity of the rule of law. This statement of the group’s task reflected the group’s post-realist, post-*Brown* intellectual position. Perhaps taking similar observations as his cue, H. L. A. Hart pursued each of these themes in his *Discretion* paper a few weeks later.¹⁵⁹

The group’s meetings turned out to be enormously popular. As one participant reported in the *Harvard Law School Bulletin*, the meetings officially adjourned at 10:30 PM, but on occasion “the [Signet] Club steward has [reportedly] had to threaten to shut off the heat in order to compel some of the more perseverant discussants to abandon the cause.”¹⁶⁰ Throughout the year, a range of professors led the group’s discussions, presenting papers on a number of related topics. The group discussed papers by Henry Hart, Julius Stone, Jack Dawson, Kingman Brewster and Donald Turner, Herbert Wechsler, Carl Friedrich, and Louis Jaffe.¹⁶¹ The task of kicking off the year’s discussions with the first paper, though, fell to H. L. A. Hart. Methodological suspicion aside, the group wanted to learn what Hart’s linguistic philosophy could contribute to their project. “Behind all of these questions is, of course, the more fundamental one of the power of words, or of concepts expressed in words, to direct and control human action,” the organizers wrote.¹⁶² “In this aspect the problem becomes one of philosophy”¹⁶³

II. H. L. A. HART’S ACCOUNT OF DISCRETION

At his talk, Hart distributed a three-page outline of his remarks, and then circulated the complete typewritten paper a few weeks later, on November 19 — “practically verbatim what I said last time,” he noted,¹⁶⁴ though clearly revised and reworked in the aftermath of the

¹⁵⁸ *Id.*

¹⁵⁹ Hart’s attention to market economics — for example, his attention to Interstate Commerce Commission rate-fixing — is particularly unusual in the context of his more abstract other work. Further, Hart’s claim that human beings, and therefore lawmakers, inevitably operate with imperfect information, as discussed below, resonates with aspects of Hayek’s thought.

¹⁶⁰ Shuman, *supra* note 140, at 18.

¹⁶¹ See, e.g., Louis L. Jaffe, Professor of Law, Harvard Law Sch., Memorandum to the Legal Philosophy Discussion Group (Apr. 23, 1957) (on file with the Harvard Law School Library, Papers of Paul A. Freund, Box 155, Folder 5) (announcing Jaffe’s paper, *Bureaucratic Discretion: Current Dilemmas*); Memorandum to the Legal Philosophy Discussion Group Announcing the Next Meeting on March 19, 1957 (undated) (on file with the Harvard Law School Library, Papers of Paul A. Freund, Box 155, Folder 5) (announcing Friedrich’s paper).

¹⁶² Oct. 8, 1956, Memorandum to the Legal Philosophy Discussion Group, *supra* note 150, at 1.

¹⁶³ *Id.* The memorandum adds “and psychology,” *id.*, reflecting the view (pioneered by the realists) that psychology had much to offer the study of judicial behavior.

¹⁶⁴ Hart, *Discretion*, *supra* note 12, at 652 n.† (emphasis omitted).

group's meeting to clarify points that were met with confusion. Although he noted that his paper was somewhat unpolished — “so fugitive a piece does not deserve so durable a form,” he wrote¹⁶⁵ — it was carefully thought out and formally written, reflecting his strong interest in the subject and his respect for his audience. “Paper-preparing” for *Discretion*, he wrote to his wife, “took some time.”¹⁶⁶ Although *Discretion* was in some respects a rehearsal for parts of his later, published work,¹⁶⁷ the essay presented vivid examples, detailed explanations of ideas he would mention only in passing in other writings, and ideas that, in the context of his broader work, mark uncharted territory.

A. Clarifying Fundamental Questions

In the wake of Bodenheimer's criticism — and in light of the general air of suspicion about the value of Hart's analytic method — Hart wanted to demonstrate that conceptual analysis was useful to jurisprudence, not a theoretical straitjacket.¹⁶⁸ *Discretion*, seen this way, was intended as an example for the American academy of how the analytical approach to definition and the “elucidation” of concepts could be profitably employed.

Discretion began by specifying the five questions Hart believed were most important to bring forward, questions he thought had been lurking behind the group's discussion without being stated clearly. “I have the conviction that if we could only say clearly what the questions are, the answers to them might not appear so elusive,” Hart wrote.¹⁶⁹ He believed that clarity in questions leads to clarity in answers. Hart's questions indicated his attention both to conceptual structure and to social reality, reflecting the unique blend of “analytical jurisprudence” and “descriptive sociology” that would reappear in *The Concept of Law*.¹⁷⁰ Hart's questions also revealed his attention to institutional design, a theme largely absent from his later work.

¹⁶⁵ *Id.*

¹⁶⁶ Letter from H. L. A. Hart to Jenifer Hart, *supra* note 2.

¹⁶⁷ See, for example, HART, *THE CONCEPT OF LAW*, *supra* note 41, at 272, where he expresses his “picture of the law as in part indeterminate or incomplete and of the judge as filling the gaps by exercising a limited law-creating discretion.”

¹⁶⁸ It is worth noting that this meeting may have been the first occasion on which many of the group's members met Hart or heard any of his ideas directly from him. Their preconceptions about “analytical jurisprudence” would likely have been at the front of Hart's mind as he prepared his paper.

¹⁶⁹ Hart, *Discretion*, *supra* note 12, at 652.

¹⁷⁰ In the preface to *The Concept of Law*, Hart wrote that his book was simultaneously “an essay in analytical jurisprudence” and “an essay in descriptive sociology.” HART, *THE CONCEPT OF LAW*, *supra* note 41, at v.

Most importantly, Hart insisted on investigating what discretion *is* separately from investigating where discretion should fit into the legal system.¹⁷¹ Therefore, he led with an abstract, descriptive question about discretion's conceptual nature: "What is discretion, or what is the exercise of discretion?"¹⁷² Only then did Hart move on to questions of the place and function of discretion in a legal system — suggesting a more normative agenda concerning the proper place of discretion in law. To start: "Under what conditions and why do we in fact accept or tolerate discretion in a legal system?"¹⁷³ Then he turned to discretion's necessity and relation to the broader values of a legal system: "Must we accept discretion or tolerate discretion, and if so, why?"¹⁷⁴ "What values does the use of discretion menace, and what values does it maintain or promote?"¹⁷⁵ And finally, "What can be done to maximize the beneficial operation of the use of discretion and to minimize any harm that it does?"¹⁷⁶ Satisfied that he had framed his questions clearly, Hart began to provide answers.

Hart's argument in *Discretion*, reflecting the structure of his questions, was part descriptive and part normative. First, he explored the question "What is discretion . . . ?" as a matter of descriptive conceptual analysis. Discretion, he argued, is a form of decisionmaking that occupies an "intermediate place between choices dictated by purely personal or momentary whim" on the one hand, and the determinate application of clear rules on the other.¹⁷⁷ Discretion is a special form of *reasoned* decisionmaking that entails constraints on the possible courses of action that the decisionmaker may choose to take. In the second part of his essay, Hart moved into more normative territory, making an argument about the proper role of discretion in the legal system. For Hart, legal systems inherently contain spheres of indeterminacy.¹⁷⁸ There are inevitably gaps in the law, and officials making

¹⁷¹ Hart specifically excluded psychological questions from his discussion (noting that they had been raised by Freund), citing his belief that:

[I]f we clearly understand what it is to exercise a discretion and what in different fields counts as the satisfactory exercise of a discretion, we shall not really have to face an independent psychological question of the form: what are the psychological conditions of its sound exercise or how are we psychologically able to exercise a discretion?

Hart, *Discretion*, *supra* note 12, at 653. Hart further believed that focusing on the psychological aspects of discretion would conceal the fundamental philosophical questions in need of resolution: "I think this question, which looks on the surface to be one of empirical psychology, perhaps really expresses in a rather misleading form just our initial unclarity about what discretion is and what in various fields we count as a sound exercise of discretion." *Id.*

¹⁷² *Id.* at 652.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 658.

¹⁷⁸ *Id.* at 661–64.

decisions have to fill those gaps. When they do so, Hart argued, legal officials ought to exercise discretion rather than arbitrary choice or whim.¹⁷⁹ Resolved with sound discretion, as opposed to fiat, indeterminacy is fully consistent with the rule of law.

B. *What Is Discretion?*

1. *The Analytical Approach to Definition.* — Hart devoted a large portion of his paper to the first question: “What is discretion . . . ?” It was a classic application of Hart’s linguistic method. He believed that providing an account of a concept requires analyzing the way ordinary speakers use the *words* associated with that concept.¹⁸⁰ To analyze discretion, therefore, Hart investigated the uses of the word “discretion” in a variety of different contexts — legal and nonlegal — and then inferred the general principles at play.¹⁸¹ While Hart was aware that there were borderline cases — penumbral situations that might or might not be classified as discretion — he mainly aimed to contribute a clear theory of the *core* phenomenon: when we all agree discretion is present, what *is* it?¹⁸² A clear definition of the core phenomenon was, in Hart’s view, what the group needed most: “[t]he position” of the group with respect to discretion, Hart speculated, was “parallel to a person who knows his way about town by rote but could not draw a

¹⁷⁹ *Id.* at 663–64.

¹⁸⁰ For information on the relationship between Hart’s analytical jurisprudence and linguistic philosophy, see MACCORMICK, *supra* note 27, at 12–19. As noted above, Hart himself wrote that in jurisprudence “it is particularly true that we may use, as Professor J. L. Austin said, ‘a sharpened awareness of words to sharpen our perception of the phenomena.’” HART, THE CONCEPT OF LAW, *supra* note 41, at v. Indeed, in order to answer the question “What is discretion . . . ?,” Hart followed the analytical method that he had acquired from Austin and the Oxford circle of analytic philosophy. There will no doubt be some debate, however, about whether Hart’s descriptions of ordinary usage are in fact correct.

¹⁸¹ Hart believed that there *will* be meaningful similarities. “It might of course be the case that the term discretion is hopelessly vague and used by courts and juristic writers in an entirely haphazard fashion,” Hart admitted. Hart, *Discretion*, *supra* note 12, at 653. But:

[I]f this were the case, the only observation which we could make about the meaning of the term discretion would be just this [that it is “hopelessly vague”]. But it seems to me very unlikely that this is in fact the case: if it were the case, we must agree to discuss discretion without any expectation that we should in fact be talking about a common subject. What is likely to be the case, as in all the major notions involved in the law, is that we can find a set of characteristics which are found together in the standard case of discretion: that is, in cases where everyone would agree that we have the phenomenon of discretion

Id. In other words, Hart believed that even though discretion arises in different forms in a number of different legal contexts — “rate fixing by the [Interstate Commerce Commission], the grant or refusal of specific performance by a court, the exercise of reprieve or pardon by the executive” — there is a core phenomenon common to every situation. *See id.*

¹⁸² *Id.* at 654.

map of it or the crude case where we can say that I can recognize an elephant but I could not define the term 'elephant' for you."¹⁸³

2. *Hart's Taxonomy of Discretion in Law.* — Hart began his analysis of the core phenomenon by considering a broad list of cases where discretion occurs in the legal system. Hart was not concerned with discretion in courts alone; he was aware that discretion arises not just in statutory or constitutional interpretation, but also in many other settings. Although it would become clear that the role of judges was of special concern for Hart (as it was for the process theorists), he warned against focusing too much on one kind of example at the outset, advising the group "to remind ourselves of the tremendous diversity of the situations in which this phenomenon appears, for nothing in this field is so misleading as over-concentration on one sort of example."¹⁸⁴

The main distinction in Hart's taxonomy of discretion in law was simple.¹⁸⁵ Sometimes, lawmakers explicitly delegate discretionary power to officials or institutions — the powers, say, to set interest rates, to end hunting season, to appoint officials, to issue licenses, and so on. In Hart's terminology, these are examples of "Express or Avowed . . . Discretion."¹⁸⁶ By contrast, in cases of "Tacit or Concealed Discretion,"¹⁸⁷ the legal system does not *explicitly* grant discretionary authority to an official; instead, the official, making an effort to apply rules intended to be as dispositive as possible, finds that the rules do not yield a determinate result, making necessary the exercise of discretion. Key examples in this category are "disputable questions"¹⁸⁸ in statutory interpretation and the application of precedent.¹⁸⁹ A third category, which received no further discussion, includes cases of "Discretionary Interference or Dispensation from Acknowledged Rules": pardons and "[i]njunction[s] against exercise of common law remedies."¹⁹⁰

Hart further noted that institutions are sometimes charged with exercising multiple forms of discretion. "Express or Avowed . . . Discretion," for example, can be exercised by "administrative bodies" (Hart identified the now-defunct Interstate Commerce Commission and "Fish and Game Commissioners" as possibilities), or by courts in

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 655.

¹⁸⁵ *See id.* at 655–56.

¹⁸⁶ *Id.* at 655.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 656.

¹⁸⁹ *Id.* This distinction reappeared exactly in *The Concept of Law*, but without the terminology. *See* HART, THE CONCEPT OF LAW, *supra* note 41, at 128–33. In addition, Sebok notes that Hart's distinction "paralle[s] the distinction between continuing and noncontinuing discretion in *The Legal Process.*" SEBOK, *supra* note 22, at 169 n.232.

¹⁹⁰ Hart, *Discretion*, *supra* note 12, at 655.

the cases of sentencing, “[d]iscretionary remedies,” and the application of standards, like “reasonable care,” so broad as to be understood as constituting an explicit grant of discretionary authority.¹⁹¹ Delving deeper into institutional roles, Hart pointed out that this form of standard-applying discretion is entrusted sometimes to judges, and sometimes to juries.¹⁹² Hart classified most appellate adjudication in “disputable . . . case[s]”¹⁹³ — the most politically charged form of decisionmaking on the list — as “Tacit or Concealed . . . Discretion” exercised by courts.¹⁹⁴

3. *Looking Beyond the Law: Discretion as a Middle Position.* — Having categorized the legal examples of discretion, Hart turned to examples beyond the law for a more definitive clarification of the core phenomenon. “In attempting to define or elucidate this term, we must for the moment avert our gaze from the Law,” Hart said, “because we shall find that the phenomenon of discretion which worries us in the Law has its roots and important place in our ordinary life.”¹⁹⁵ So what *is* discretion in ordinary life? And how do nonlegal uses of the term affect our understanding of discretion in legal contexts? The full contour of Hart’s account began to take shape at this stage in the analysis, as he set out simultaneously to distinguish discretion from raw choice and from determinate rule application. This way of situating discretion stood in exact analytical parallel to the intellectual goal he shared with the process theorists: finding a rationally stable middle road between realism (associated with “whim”) and formalism (associated with determinate rule application).

(a) *Distinguishing Discretion from Arbitrary Choice.* — It was immediately apparent to Hart that “discretion” denotes something different from arbitrary choice. Although he was speaking in abstract terms, this distinction constitutes a tacit rejection of legal realism and its (sometimes-caricatured) account of judicial decisionmaking. As Hart put it, discretion is not present in “cases where in choosing we merely indulge our personal immediate whim or desire.”¹⁹⁶ Far from denoting the whimsical exercise of choice, “discretion is . . . the name

¹⁹¹ *Id.* The discussion of the due care standard reappeared in *The Concept of Law*. See HART, *THE CONCEPT OF LAW*, *supra* note 41, at 132–33.

¹⁹² Hart, *Discretion*, *supra* note 12, at 655.

¹⁹³ *Id.* at 656.

¹⁹⁴ It is unclear where some forms of discretion would fit in Hart’s taxonomy. For example, prosecutorial discretion (which he ignored) could be considered “Express or Avowed” because of the prosecutor’s legal right to decide which cases to bring. Or it could be considered “Tacit or Concealed” because, faced with limited resources, prosecutors must make choices and cannot take up every case. Or it could sometimes count as “Dispensation from Acknowledged Rules” for potential defendants. Or perhaps prosecutorial discretion presents a mix of all three.

¹⁹⁵ Hart, *Discretion*, *supra* note 12, at 656.

¹⁹⁶ *Id.* at 657.

of an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence; it is the power of discerning or distinguishing what in various fields is appropriate to be done and etymologically connected with the notion of discerning.”¹⁹⁷ “Hence,” he said, “we speak of years of discretion meaning not merely the age at which a human being is able to choose (because we can choose long before this) but merely the age when the judgment or discernment to be exercised in choice is ripe.”¹⁹⁸ “A discreet person,” he continued, “is not someone who just remains silent but who chooses to be silent when silence is called for.”¹⁹⁹

To illustrate, Hart asked his audience to confront a dilemma that weighed heavily on the legal process generation: “Will you have a martini or a sherry?”²⁰⁰ Specifically, how would you defend your choice from criticism? “You choose a martini, and I ask why,” Hart supposed; “you reply, ‘Because I like it better — that’s all.’”²⁰¹ This choice, for Hart, is not an exercise of discretion: “[T]he chooser accepts no principle as justifying his choice: he is not attempting to do something which he would represent as wise or sound or something giving effect to a principle deserving of rational approval and does not invite criticism of it by any such standards.”²⁰² A choice, he argued, counts as an exercise of discretion only if it invites a *reasoned defense* grounded in principles “deserving of rational approval.”²⁰³ Of course, if the person who chooses the martini can in fact offer a rational defense, Hart conceded that it might be a discretionary decision after all.²⁰⁴

(b) *Distinguishing Discretion from the Determinate Application of Rules.* — Having distinguished discretion from raw choice, Hart’s next step was to distinguish discretion from another decisionmaking extreme: the determinate application of rules, whereby judges (and other officials, if appropriate) simply apply rules mechanically in a way that provides a correct answer in every case. When “the principles are

¹⁹⁷ *Id.* at 656.

¹⁹⁸ *Id.* at 656–57.

¹⁹⁹ *Id.* at 657.

²⁰⁰ *Id.* This example and the examples that follow provide an amusing picture of the concerns of the *Mad Men*-era academic elite and reflect Hart’s keen sense of humor. The examples might suggest that this group of law professors was worryingly disconnected from the social reality to which their legal theories would eventually apply. But from another perspective, the examples reveal something important about Hart’s intellectual style — his belief that the careful analysis of ordinary events can focus our attention and shed light on precepts of extraordinary social and political importance.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* Hart offered the parallel example of voting in an election: if a choice is justified according to rational principles, as opposed to personal whim, then the decision may qualify as discretionary. *Id.*

clear, determinate, highly specific, and uniquely determine the particular thing we have to do,” Hart said, “we do not classify [the resulting choices] as cases of discretion and it would be confusing to do so.”²⁰⁵ Although Hart was describing an abstract mode of decisionmaking, his audience would have understood him as rejecting the (again, sometimes-caricatured) formalist idea that the law is a determinate, deductive science.

To illustrate, Hart invited his audience to consider yet another puzzling predicament: sharpening a pencil. “I go to the drawer and I am faced with a knife, three spoons, and two forks.”²⁰⁶ In the end, “I choose a knife: if asked why, I would not here reply, ‘Because I like it,’ but perhaps, ‘Because I want to sharpen a pencil and this is the obvious way to do it.’”²⁰⁷ In this case, Hart suggested, there is a *correct answer*.²⁰⁸ And where there is a correct answer, the word “discretion” seems out of place.²⁰⁹ “[I]t seems to me absurd to speak of a choice of a knife as an exercise of discretion,” Hart said; “it was the only sensible thing to do.”²¹⁰ Hart generalized from the example to conclude: “[W]hen our aims are as determinate as this and the situation is as clear as this and the proper thing to do is patent to the elementary knowledge of what will produce what, we choose indeed correctly but not in the exercise of discretion.”²¹¹

Consider as another example an American ritual that may have caught Hart by surprise:

“The Star Spangled Banner” is played: I stand up. “Why did you stand up?” I reply not indeed by saying, “Because I wanted to,” but I cite the established rule which quite unambiguously specifies what I am to do in this particular case. Here I have done the correct thing: I have made the right choice, but it would be misleading to describe [the choice] as the exercise of a discretion.²¹²

On Hart’s analysis, if the answer is clear from the start, and there is no plausible way the decision could go differently consistent with the rules being applied, the decision does not involve discretion.

(c) *A Middle Road Between Arbitrary Choice and Determinate Rules*. — Once he had situated discretion in the “intermediate” space

²⁰⁵ *Id.* at 658.

²⁰⁶ *Id.*

²⁰⁷ *Id.* Perhaps Hart was unaware that specially designed pencil sharpeners have been available since at least 1837. See *Antique Small Pencil Sharpeners: 1837–1921*, EARLY OFF. MUSEUM, http://www.officemuseum.com/sharpener_small.htm (last visited Oct. 27, 2013).

²⁰⁸ Hart, *Discretion*, *supra* note 12, at 658.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

between arbitrary choice and determinate rule application,²¹³ Hart drew out his understanding further with a more sophisticated example designed to reveal the general principles of discretion, which are present in legal and nonlegal situations.²¹⁴ He imagined that:

A young hostess is giving her first dinner party and the question arises, shall she use for this occasion the best knives: they are old silver, very beautiful, and they will set off the snowy tablecloth and the glasses. On the other hand, they are undoubtedly heavy and somewhat difficult to handle: they are not a bit sharp, and also their splendour might be thought a little bit showy by some.²¹⁵

In broad strokes, the hostess's aims are clear: "[A] pretty dinner table, admiration, but also the comfort of the guests and perhaps that of an old distinguished judge with somewhat shaky hands who is going to the party."²¹⁶ Faced with these aims and trade-offs, "the hostess ponders, she thinks out the possible disasters and some possible good consequences from the courses before her: she balances one consideration against another and perhaps wonders whom she can consult."²¹⁷ In turn, "[s]he asks someone who has had a lot of experience in this field, an old lady, who says sagaciously that 'on the whole I think the wisest thing to do would be to use the second-best set.'"²¹⁸ Importantly, the old lady "can give reasons for this such as the danger of discomforting old Mr. X. and his unfortunate behaviour when some small thing sets off his temper: she reminds the hostess of the possible jealousy of the younger guests, and so on."²¹⁹

The travails of the young hostess demonstrate six features of discretion that, for Hart, constitute the core of the phenomenon.²²⁰ First, there is no "clear right" decision.²²¹ Second, "[t]here is not a clear definable aim" at a helpful level of specificity,²²² though some outcomes, including "the discomfort of the guests" and the "ugly appearance of the table,"²²³ may be obviously bad. Third, the exact consequences of each possible decision are not clear.²²⁴ Fourth,

²¹³ *Id.*

²¹⁴ *See id.* at 658–60.

²¹⁵ *Id.* at 659. Hart's example again harkens back to the social mores of the 1950s, when sharpening pencils, selecting cocktails, and advising hostesses were apparently all the rage.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 659–60.

²²¹ *Id.* at 659.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* Hart distinguished this case from the case of the pencil sharpener, where there was a "high probability" that a knife would in fact do the job. *Id.*

[w]ithin the vaguely defined aim of a successful dinner party, there are distinguishable constituent values or elements (beauty of the table, comfort of the guests, etc.) but there are no clear principles or rules determining the relative importance of these constituent values or, where they conflict, how compromise should be made between them.²²⁵

Fifth, words like “wise” and “sound” make more sense to describe discretionary decisions than do words like “right” or “wrong.”²²⁶ Sixth, Hart believed that discretionary decisions are *defended* in two different ways if they are called into question: justification and vindication.²²⁷ As a justification, the hostess could defend her decision by appealing to her “honest attempt to give effect to such controlling principles or values as applied to the case and to strike impartially some compromise between them where they conflicted.”²²⁸ The justification of a discretionary decision, in other words, involves a re-creation of the process through which the decision is made, and an appeal to the reasons that influence the decision.²²⁹ Beyond this justificatory mode of defense, Hart pointed out that “the hostess might well appeal to the actual success of the dinner party” — a form of “*vindication* by results.”²³⁰ Hart was careful to point out, however, that a decision can be justified even if it happens to produce bad results.²³¹ The decisionmaker will live and learn.²³²

C. *The Proper Place of Discretion in Law*

Hart’s account of discretion so far had much in common with process theory’s notion of reasoned elaboration: Hart believed that discretionary decisions are rooted in reason and founded on “principle[s] deserving of rational approval,”²³³ and that a defense of a discretionary decision involves a reconstruction of the reasoning process that produced it.²³⁴ The second part of Hart’s essay addressed the consequences of discretion in the legal system, asking why we should accept

²²⁵ *Id.*

²²⁶ *Id.* at 660.

²²⁷ *Id.*

²²⁸ *Id.* If the hostess’s decision were challenged,

[s]he would point out how her decision had been reached: that it had been preceded by as careful a consideration of the constituent elements in a successful dinner party as she could give; that she had attempted to work out what would happen on either course; that she had thought of similar cases in her own experience and that she had obtained the advice of an experienced person.

Id.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 657.

²³³ *Id.*

²³⁴ *Id.* at 660.

it and how it can be consistent with the rule of law.²³⁵ Hart argued that discretion is the appropriate way of resolving cases with no clear answer — precisely the virtue that allows such inevitable interstices to be ruled by law instead of whim.²³⁶

1. *The Inevitability of Indeterminacy in the Legal System.* — Hart believed that indeterminacy is *inevitable* in law — an essential part of the project of prospective lawmaking.²³⁷ Why? “[B]ecause we are men not gods . . .”²³⁸ Our ability to regulate the future is inherently limited: “[A]s part of the human predicament,” Hart said, we operate under “two handicaps.”²³⁹ First, Hart believed that lawmakers can never know everything about the future world they are trying to regulate: the lawmaking enterprise is constrained by what he called a “Relative Ignorance of Fact.”²⁴⁰ Second, even if we did live in a world of perfect information, Hart believed that the vagueness inherent in human aims would still preclude perfect prospective lawmaking: the second “handicap” is a “Relative Indeterminacy of Aim.”²⁴¹ In sum, lawmakers craft legal rules without knowing everything about the future and in pursuit of aims that are multifaceted and not perfectly determinate.²⁴² Indeterminacy is the inevitable result.²⁴³

Hart illustrated these handicaps with an example that would become “the most famous hypothetical in the common law world”²⁴⁴: the rule “[n]o vehicles are to be taken into the park.”²⁴⁵ In fact, it was in

²³⁵ See *id.* at 661–65.

²³⁶ See *id.*

²³⁷ See *id.* at 661.

²³⁸ *Id.* The remark about being “men not gods” appeared verbatim in *The Concept of Law*. See HART, THE CONCEPT OF LAW, *supra* note 41, at 128 (“[T]he necessity for such choice is thrust upon us because we are men, not gods.”).

²³⁹ Hart, *Discretion*, *supra* note 12, at 661. Again note that this distinction appeared in *The Concept of Law* with very similar language, but without the categorical terms “Express or Avowed” or “Tacit or Concealed.” See HART, THE CONCEPT OF LAW, *supra* note 41, at 128–29.

²⁴⁰ Hart, *Discretion*, *supra* note 12, at 661. Compare *id.* at 661–62 (“If the world in which we have to act and choose . . . consisted of a finite number of features or characteristics,” and “the modes in which these features could combine were limited to a finite number of these modes,” and “we knew both these features and modes of combination exhaustively, then we could always know in advance all the possible circumstances in which a question of the application of a rule would arise and we could therefore in framing our rule specify exhaustively in advance all the cases to which it was to apply and those to which it was not.”), with HART, THE CONCEPT OF LAW, *supra* note 41, at 128 (“If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility.”). It seems clear that Hart used the *Discretion* paper as a model for this section of the later book.

²⁴¹ Hart, *Discretion*, *supra* note 12, at 661.

²⁴² *Id.* at 661–63.

²⁴³ See *id.*

²⁴⁴ Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008).

²⁴⁵ Hart, *Discretion*, *supra* note 12, at 662.

Discretion that this example made its debut in Hart's work. The example would feature prominently in Hart's Holmes Lecture the next April,²⁴⁶ in *The Concept of Law*,²⁴⁷ and in much jurisprudential scholarship since.²⁴⁸ In *Discretion*, Hart's analysis of "[n]o vehicles in the park" is familiar.²⁴⁹ There are some clear applications of the rule, envisioned when the rule was formulated — "the motor car, the horse and cart, the motor bicycle, and the bus" — and some penumbral cases in which the application is unclear — "skates, bicycles, perambulators, and toy motor cars."²⁵⁰ The aims of the rule against vehicles in the park are clear enough when cars and buses — cases foreseen — are involved: "[W]e know that we want peace in the park"²⁵¹ But when it comes to cases unforeseen — "the scooter, the toy motor car electrically propelled" (which Hart observed was "perhaps rather fast, moderately dangerous to the old, but great fun for the young") — "our aim is indeterminate," because "we have not settled whether some and if so what degree of peace in the park is to be sacrificed to those whose interest or pleasure it is to use these objects."²⁵² The "Relative Indeterminacy of Aim" is therefore fused in Hart's analysis with the "Relative Ignorance of Fact."²⁵³

²⁴⁶ Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37, at 607–11.

²⁴⁷ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 125–26.

²⁴⁸ See Schauer, *supra* note 244, at 1111–12, 1111 n.10.

²⁴⁹ In his Holmes Lecture, Hart would deploy the example mainly to demonstrate the inherent vagueness of legal language, which also produced legal indeterminacy. See Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37, at 607. Interestingly, Hart did not rely on the argument for indeterminacy from language vagueness in *Discretion*. Rather, Hart used the example to illustrate the idea that rules are indeterminate because no lawmaker can envision from the start all the cases that might require regulation or formulate aims with enough clarity to resolve future confusion fully. See Hart, *Discretion*, *supra* note 12, at 661–63. This account of indeterminacy dropped out of the Holmes Lecture but reappeared in *The Concept of Law*. See HART, *THE CONCEPT OF LAW*, *supra* note 41, at 126–29.

²⁵⁰ Hart, *Discretion*, *supra* note 12, at 662.

²⁵¹ *Id.*

²⁵² *Id.* at 663.

²⁵³ *Id.* at 661. (Henry) Hart and Sacks offered their own take on vehicles in the park when they explained how a "magistrate" would "decide whether a motorcycle is or is not a 'motor car' within the meaning of a speed statute." HART & SACKS, *supra* note 23, at 143; see also *id.* at 143–44. It is, however, unlikely that (Henry) Hart and Sacks got the idea for this example from H. L. A. Hart, because this section of the casebook was finished by the time of H. L. A. Hart's visit. See Eskridge & Frickey, *supra* note 23, at lxxxviii–xci (discussing the evolution of the draft, including earlier versions of chapter one). Schauer speculates that H. L. A. Hart may in fact have borrowed the example from his American colleagues:

Hart almost certainly drew the example from *McBoyle v. United States*, 283 U.S. 25 (1931), a case in which the question was whether an airplane was a vehicle for purposes of a federal statute prohibiting transporting a stolen vehicle across state lines. I suspect that Hart . . . learned of it from Henry Hart, Albert Sacks, or possibly even from Fuller himself.

Schauer, *supra* note 244, at 1115 n.20 (citation omitted).

Hart offered Interstate Commerce Commission rate-fixing²⁵⁴ as a further “dramatic illustration”²⁵⁵ of the limiting “handicaps” on prospective lawmaking.²⁵⁶ The general goal of the rate-fixer, Hart observed, can be stated easily: finding “a rate which is reasonable and fair.”²⁵⁷ This general aim is helpful to a limited extent: it does establish that some rates are clearly out of the question.²⁵⁸ A rate too high “would hold the public up to ransom for a vital service” and “defeat any purpose that we could have in regulating rates,” while “a rate too low to provide any possible incentive for running the railway organization or too low to provide returns higher than the occupation of sweeping the streets would normally have to be rejected.”²⁵⁹ Yet the general aim provides little guidance when it comes to selecting from among rates that are not clearly unacceptable.²⁶⁰ Hart concluded that behind the general goal, there are in fact many vague and conflicting aims at play: a “grand matrix capable of [an] indefinite number of different fillings or completions.”²⁶¹ Further, changing factual circumstances “reveal different factors requiring attention.”²⁶² For example, “[t]here may be rates which owing to the predicament of a local industry would jeopardize the prosperity of millions but apart from this consideration might well be thought fair.”²⁶³

Indeterminacy, thus, is unavoidable. The world in which perfect prospective lawmaking were possible, he said, “would be the world of . . . mechanical Jurisprudence which we have long been taught is not our world.”²⁶⁴ Still reeling from Bodenheimer’s false accusation that his analytic style amounted to “mechanical jurisprudence” in disguise, Hart was unambiguous in his fresh rejection of legal formalism:

²⁵⁴ Although rate-fixing is an exercise of “Express or Avowed” Discretion, see Hart, *Discretion*, *supra* note 12, at 655, the same analysis would apply in the case of “Tacit or Concealed Discretion” (like the “[n]o vehicles in the park” example), see *id.* at 661–62.

²⁵⁵ *Id.* at 663.

²⁵⁶ *Id.* at 661; see also *id.* at 663–64.

²⁵⁷ *Id.* at 663.

²⁵⁸ *Id.* at 664.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 663–64.

²⁶² *Id.* at 664.

²⁶³ *Id.*

²⁶⁴ *Id.* Hart’s analysis of the intrinsic limitations of human knowledge would have appealed to many members of the discussion group, who were suspicious of central economic planning and attentive to information problems. Hart’s analysis of the problem of rate-fixing would have been particularly relevant to the group, which had recently discussed excerpts from Hayek. Just as Hayek had argued that the centrally planned economy is a figment of the utopian imagination, Hart argued that the inherent limits of human knowledge foreclose the possibility of crafting totally determinate law for the future. See POSTEMA, *supra* note 51, at 141–80 (discussing Hayek’s contribution to mid-twentieth-century American jurisprudence).

“Our world,” he said, “is indeed different.”²⁶⁵ “When the actual case arises,” a judge will “have to weigh and choose between or make some compromise between competing interests.”²⁶⁶ It was to the details of this decisionmaking process that Hart turned next, seeking guidance for officials lost in the penumbra.

2. *The Responsibility of Discretion.* — What mode of decision-making should legal officials employ when they confront indeterminacy, as they inevitably will? Hart’s answer was simple: discretion — the special mode of reasoned decisionmaking he had carefully distinguished from other possibilities.²⁶⁷ “[D]iscretion must take its place,” Hart wrote, “because the area is really one where reasonable and honest men may differ, however well informed of the facts in particular cases.”²⁶⁸ Pointedly, Hart expected legal officials *not* to treat legal indeterminacy as an opportunity for the exercise of personal choice. “When we are considering the use of discretion in the Law we are considering its use by officials who are holding a responsible public office,” Hart said.²⁶⁹ “It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim”²⁷⁰

Put slightly differently, Hart’s view was that legal officials ought to make decisions that exemplify the features that set discretion apart from other forms of decisionmaking. The criteria for the best exercise of discretion are, in this sense, implicit in the concept of discretion itself. Hart’s analysis placed central importance on rationality, the appropriate selection of factors for consideration, and the means of justification.

²⁶⁵ Hart, *Discretion*, *supra* note 12, at 662. In *The Concept of Law*, Hart also compared the world of perfect information to the world of mechanical jurisprudence. See HART, *THE CONCEPT OF LAW*, *supra* note 41, at 128. But in the *Discretion* paper he additionally stated that “[o]ur world is indeed different” to emphasize to his Harvard audience his belief that analytical and mechanical jurisprudence are not allies. Hart, *Discretion*, *supra* note 12, at 662.

²⁶⁶ Hart, *Discretion*, *supra* note 12, at 663.

²⁶⁷ Reiterating a point he made earlier, Hart again observed that when the limitation on our ability to regulate the future is “patent at the outset,” lawmakers sometimes “confer a discretionary jurisdiction on some official or authority” to make relevant decisions in the future, when more information is available and the particular application of vague general aims is clearer, resulting in “Avowed Discretion.” *Id.* at 661. When the limitation is “not so patent” at the outset, lawmakers try to craft prospective rules, and “though we may proceed happily with them over a wide area,” in some cases “the rules break down and supply no unique answer in a given case.” *Id.* Here the result is “Tacit or Disguised Discretion.” *Id.* Note that here Hart called it “Tacit or Disguised” whereas in other instances he called it “Tacit or Concealed.”

²⁶⁸ *Id.* at 664.

²⁶⁹ *Id.* at 657.

²⁷⁰ *Id.*

(a) *Rationality*. — First, discretionary decisions are rational. Discretion, for Hart, is reasoned decisionmaking rooted in principles “deserving of rational approval,”²⁷¹ and sound discretionary decisions are decisions living up to that standard. More specifically, rationality in discretionary decisionmaking requires a certain *method* of decision: “[D]ecisions involving discretion are rational primarily because of the manner in which they are made,” he wrote, and must include “the determined effort to identify what are the various values which have to be considered and subjected in the course of discretion to some form of compromise and subordination.”²⁷²

Hart did not spell out exactly what he meant by “reason” or “rational approval.” Indeed, a weakness of his essay is that he did not discuss in more detail how, precisely, the demand for rationality constrains decisionmaking. But he seemed to have expected sound discretionary reasoning to display not just logical integrity, but also a form of practical wisdom, associating the term “discretion” with “practical wisdom or sagacity or prudence”²⁷³ and praising “rational” decisions with words like “wise” and “sound.”²⁷⁴

As we have seen, Hart’s stress on reason and rational justification in discretion is strikingly consistent with the Process School’s idea of reasoned elaboration as a normative requirement for sound judicial decisionmaking. Hart and the process theorists shared the view that “rationality” is a demanding requirement, and one that judges and other legal officials are obliged to fulfill.

(b) *Choice of Factors*. — Hart believed that all discretion — whether “Avowed” or “Tacit or Concealed” — must be exercised rationally. But pushing further, he also believed that different types of discretionary decisions, arising in different positions in the legal process, require attention to different factors. Hart said that we must “characterize what in each field are the factors which require our attention if discretion is to be soundly exercised.”²⁷⁵

For Hart, there was a connection between the *type* of discretion in question and *how* it should be exercised. “[T]he *type* of factor to which weight would be properly attached in the exercise of discretion will vary in different types of situations,” he wrote.²⁷⁶ In particular, the “Avowed Discretion”²⁷⁷ arising from a specific regulatory delegation calls for a different deliberative process than does the “Tacit or

²⁷¹ *Id.*

²⁷² *Id.* at 664.

²⁷³ *Id.* at 656.

²⁷⁴ *Id.* at 657.

²⁷⁵ *Id.* at 665.

²⁷⁶ *Id.* at 655.

²⁷⁷ *Id.* at 656.

Concealed Discretion” arising from the indeterminacy of rules or from different possibilities for the use of precedent.²⁷⁸ The way the discretion comes about in the first place significantly influences the factors that the official charged with exercising the discretion should consider when carrying it out. In fact, Hart specifically said that one of his principal motivations for distinguishing between “Tacit or Concealed” and “Avowed” discretion was to show that these different forms of discretion require attention to different sets of factors, reflecting their different institutional provenances.²⁷⁹

This point is significant: Hart acknowledged that the set of factors that should be considered in the exercise of discretion is a function of the *type* of discretion at issue, and therefore relates to the position in the legal process of the official charged with exercising it. Although Hart fell short of specifying exactly what these factors are, it is clear that he believed an administrative official fixing a rate or a Fish and Game Commissioner deciding when to end hunting season should refer to a set of concerns quite different from that of an appellate judge interpreting a statute. Though Hart’s theory on this point remains imperfectly developed, his analysis resonated with process theory’s focus on institutional competence. He believed that officials in different settings should make decisions in light of factors appropriate to the specific role those officials are called upon to play — interpreter of rules, applier of standards, setter of rates, opener of free season on elk, and so forth.

(c) *Justification.* — Finally, Hart thought that a sound exercise of discretion, if rational and based on the right factors, can be *justified*. Recall that Hart held that discretionary decisions are primarily justified by reconstructing the reasoning process that led to the decision, though they can also be vindicated by the actual success of the decision once implemented. This emphasis on justification — defense of decisionmaking by appeal to the process of the decision and the reasons for it — resonated with the Process School’s view that judges have a professional responsibility to explain their decisions in writing.²⁸⁰

The process theorists were concerned with the written exposition of decisions partly because they believed that it helps to bolster the notion that adjudication is a professional craft, one that calls for expertise, scrutiny, and continuous reflection.²⁸¹ Hart, too, believed that discretion is a craft that can be improved with experience. We “learn

²⁷⁸ *Id.* at 655.

²⁷⁹ *See id.* at 655–56.

²⁸⁰ *See White, supra* note 51, at 286 (describing how *Harvard Law Review* Forewords from the mid-1950s chastised the Supreme Court for overreliance on per curiam opinions).

²⁸¹ *See, e.g., Dorf, supra* note 25, at 923–24.

from a series of vindications certain new factors making for success to which we must also attend henceforth if our choices are to be justifiable. There is a progressive evolutionary discovery of important and hence justifying factors."²⁸²

3. *Hart's Solution to the Problem of Legal Indeterminacy.* — Hart mentioned that discretion "worry[d]" his colleagues.²⁸³ He was aware that the post-realist, post-*Brown* process theorists were concerned that choice in law and the rule of law are in tension. Yet in Hart's view, indeterminacy can be fully consistent with the rule of law if the officials charged with resolving it exercise genuine discretion: if they appeal to principles "deserving of rational approval" and identify and weigh the factors that are properly relevant. When it came to judges, Hart's analysis was in lockstep with process theory: the criteria for good decisions provide a constraint on judicial power, ensuring that decisions are rooted in rational principles, not dependent on the personal "fancy" or "whim" of the judge, and grounded in appropriate factors.²⁸⁴

For Hart, discretion presented a *solution* to the problem of indeterminacy, not a problem of its own. In light of the "handicaps" on our ability to regulate the future, it is the possibility of sound discretion that makes the entire project of prospective lawmaking possible in the first place.²⁸⁵ Hart saw discretion as essential, not antithetical, to the rule of law: it is *the job to be done* when indeterminacy inevitably arises.

III. THE LEGACY OF *DISCRETION*: THE HARTS, FULLER, AND DWORKIN

A few days after his presentation, Hart described the occasion in a letter to his wife. He noted that he had provoked "a strong debate trying to convince lawyers they had better start analyzing" the terms of their discussion more carefully, instead of "asking 9 undifferentiated questions at once."²⁸⁶ He sounded pleased with his performance, im-

²⁸² Hart, *Discretion*, *supra* note 12, at 660.

²⁸³ *Id.* at 654.

²⁸⁴ Dorf also reminds us that for Hart, some (judicial) cases do not require discretion, because the outcome is clearly determined by stated rules. See Dorf, *supra* note 25, at 911–12, 912 n.129. Thus, part of Hart's solution to the problem of indeterminacy could be that indeterminacy arises in only a small number of cases. *Discretion* adds to this analysis by demonstrating that Hart also believed that the style of reasoning involved in discretion presents another constraint on the range of possible outcomes.

²⁸⁵ Hart, *Discretion*, *supra* note 12, at 661.

²⁸⁶ Letter from H. L. A. Hart to Jenifer Hart, *supra* note 2. Lacey picks up on the language of this letter in her biography of Hart when she notes that he "provoked a stormy debate." LACEY, *supra* note 16, at 188.

pressed with his new colleagues, and hopeful for what the group could accomplish:

In spite of (or perhaps because of) the storm, I was judged a success It's quite commendable that these busy & rather proud lawyers with a v. vocational or practical slant should do this. So we'll see what happens. . . . [T]he young lecturers . . . were pleased to see the potentates challenged: not that the potentates are bad here: they are very good.²⁸⁷

What Hart probably did not realize is that the ideas he expressed would play pivotal roles in jurisprudence in the next half century, provoking a debate with Henry Hart, launching his decades-long quarrel with Fuller, and mapping some of the arguments he deployed in his response, decades later, to Dworkin — a student of Fuller and both Harts and an editor of this *Review* during “Harvard’s Jurisprudence Year.”²⁸⁸

A. *The Hart-Hart Debate?*

Hart reflected more publicly on his participation in the Legal Philosophy Discussion Group the next winter in a BBC broadcast — “discharged on the British public, or such parts as listen to the Third Programme,”²⁸⁹ he joked to another participant in the Group — which was subsequently published in the BBC magazine *The Listener*. Fuller read Hart’s reflection and sent copies to Justice Frankfurter²⁹⁰ and “[p]resent and [f]ormer [m]embers” of the discussion group (which had reconvened the next year, without the visitors).²⁹¹ This time, Hart sounded frustrated at his colleagues’ distaste for linguistic analysis:

I remember meeting with some colleagues, lawyers and philosophers, to discuss the notion of a discretion in the judicial process. This is a matter

²⁸⁷ Letter from H. L. A. Hart to Jenifer Hart, *supra* note 2 (emphasis omitted).

²⁸⁸ LACEY, *supra* note 16, at 185–86 (discussing Dworkin’s activities as a Harvard Law student that year).

²⁸⁹ Letter from H. L. A. Hart, Professor of Jurisprudence, Univ. of Oxford, to Morton White, Professor of Philosophy, Harvard Univ. (Dec. 18, 1957) (on file with the New College Library, University of Oxford).

²⁹⁰ See Letter from Justice Felix Frankfurter to Lon Fuller, Professor of Law, Harvard Law Sch. (Apr. 1, 1958) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 15). Justice Frankfurter wrote:

You are very generous to co-opt me into your legal philosophy discussion group, even if only to the extent of sending me the extract from H. L. A. Hart’s talk over the B.B.C. As a regular reader of *The Listener*, I had already seen the full text of his address, but this did not lessen in the slightest the pleasure you gave me in remembering me among your correspondents.

Id. at 1. Hart, for his part, steered clear of Justice Frankfurter during his year in the United States; he once called Justice Frankfurter a “chattering monkey.” LACEY, *supra* note 16, at 187 (quoting Hart).

²⁹¹ See Memorandum from Lon L. Fuller, Professor of Law, Harvard Law Sch., to Present and Former Members of the Legal Philosophy Discussion Group 1 (undated) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 8).

of importance for Americans, who wonder whether or not their administrative agencies are not too free in the discretionary powers conferred upon them, and my friends detailed a large number of problems for discussion. I began with the suggestion that we might first consider what a discretion was, and how the judgements that we called discretionary differ from other forms of judgements which are the task of an official within the legal system to make. Nothing could have been more repellent than this suggestion that we should assist things by studying what was meant by the key words in the discussion.²⁹²

Hart was right: linguistic and conceptual analysis did not go over well at first. While H. L. A. Hart was giving his oral presentation, Henry Hart scribbled at the bottom of the handout, "I am very little concerned with the 'true meaning' of discretion, or with the meaning in which 'discretion' is used in ordinary speech," noting that he preferred to focus on the "function of discretion, not verbal usage."²⁹³

For his part, H. L. A. Hart looked warily on Henry Hart's personal style at first, with an outsider's detached amusement: "He was mad-denyingly nervous. Before giving an undergraduate lecture he would pace up and down smoking cigarettes for about two hours."²⁹⁴ But over the course of the year, the two Harts encountered each other "a lot."²⁹⁵ In the wake of H. L. A. Hart's analysis of discretion, they had occasion for a direct exchange — a Hart-Hart debate²⁹⁶ — when Henry Hart delivered his own lecture on the same subject.

At the next meeting of the Legal Philosophy Discussion Group, which took place just one day after H. L. A. Hart circulated the written version of *Discretion*, Henry Hart addressed the group on *The Place of Discretion in the Legal System*.²⁹⁷ It was clear that he found H. L. A. Hart's paper deeply provocative, and in many respects right, which may explain why he kept it in his files for the rest of his life and made reference to it in future correspondence.²⁹⁸ Henry Hart's notes for his talk, which survive in his archive, reveal significant points of agreement, even direct influence, between the two Harts, while also clarifying their fundamental differences.²⁹⁹

²⁹² H. L. A. Hart, *A View of America*, THE LISTENER, Jan. 16, 1958, at 89, 90.

²⁹³ Outline of Paper on Discretion 4 (undated) (on file with the Harvard Law School Library, Papers of Henry M. Hart, Jr., Box 35, Folder 7) (Henry Hart's annotated copy of H. L. A. Hart's handout).

²⁹⁴ Sugarman, *supra* note 124, at 280 (quoting H. L. A. Hart).

²⁹⁵ *Id.* (quoting H. L. A. Hart).

²⁹⁶ If Fuller, Patrick Devlin, and Dworkin will excuse the intrusion.

²⁹⁷ See Hart Notes on *The Place of Discretion in the Legal System*, *supra* note 23.

²⁹⁸ See Nov. 5, 1957, Letter from Henry Hart to Lon Fuller, *supra* note 18, at 1 (referring to "Herbert Hart" and his contribution to their discussions on adjudication).

²⁹⁹ See Hart Notes on *The Place of Discretion in the Legal System*, *supra* note 23.

Henry Hart reiterated the idea that indeterminacy is inevitable “[b]ecause we are men, not gods,”³⁰⁰ specifically quoting H. L. A. Hart and mentioning “[H. L. A.] Hart’s two interrelated factors of ignorance of future facts and ignorance of future aims.”³⁰¹ Henry Hart seemed to restate the idea that aims and purposes, while important in law, are often vague, observing that “many purposes can be best judged from the perspective of application of policies,” in which case, “as [H. L. A.] Hart put it, aims can be seen in conjunction with the specific situation to which decision relates.”³⁰² And like H. L. A. Hart, Henry Hart believed that the indulgence of personal whim has no place in law: “[t]he idea of a ‘purely arbitrary’ but other-regarding choice,” he suggested, “is a legal and ethical monstrosity, and is inadmissible.”³⁰³

Thus, for Henry Hart, the existence of indeterminacy in law posed a problem to be solved by identifying constraints on decisionmaking. Accordingly, he set out to characterize exactly what distinguishes legitimate legal decisionmaking from “purely arbitrary” choice. For one, Henry Hart stated that the “bounds of permissible choice”³⁰⁴ are restricted in legitimate decisionmaking, reiterating H. L. A. Hart’s point that even though there are no right answers to questions calling for discretion, there are clear wrong answers. Moreover, Henry Hart noted that the appropriate “factors and criteria to guide decision”³⁰⁵ may provide a constraint, recalling H. L. A. Hart’s key idea that the factors to be considered in discretionary decisionmaking vary depending on the type of discretion in question.

Ultimately, Henry Hart seems to have believed that the term “discretion” is a misleading description of what judges should do in the sphere of indeterminacy. He proposed “reasoned elaboration of [the] grounds of decision” as a *check* on discretion,³⁰⁶ while H. L. A. Hart

³⁰⁰ *Id.* at 2 (internal quotation marks omitted).

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 4 (phrases “but other-regarding” and “and ethical” penciled in). He went on to distinguish between the case of legal officials for whom this is “self-evident,” and private persons, where it is “more nearly arguable.” *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 5 (quotation penciled in).

³⁰⁶ *Id.* There is a distinct sense in Henry Hart’s notes that he used the word “discretion,” in contrast to “reasoned elaboration,” to denote relatively free, if not entirely arbitrary, choice — despite H. L. A. Hart’s analysis to the contrary. See Sebok, *supra* note 22, at 101 (commenting on reasoned elaboration and discretion in Henry Hart’s talk). In this sense, one might infer from Henry Hart’s essay alone that H. L. A. Hart had admitted that “much discretion could not be controlled by law.” Cf. Eskridge & Frickey, *supra* note 23, at ci. In fact, H. L. A. Hart believed that the concept of discretion itself provides a constraint on decisionmaking from within, in subtle contrast to Henry Hart’s thought that the demand for reasoned elaboration constrains discretion from without. Either way, the two Harts agreed on the importance of rational constraints on legal decisionmaking.

believed that the major tenets of reasoned elaboration are actually implicit in the concept of discretion itself. For H. L. A. Hart, genuine discretion, as opposed to arbitrary choice, *is* reasoned elaboration.

Despite the rational constraints of reasoned elaboration, Henry Hart still worried that decisionmaking in indeterminate cases permits too much free choice. Accordingly, he turned to “[p]ressures toward the reasoned elaboration of grounds of decision, *even where this is not an obligation*,” focusing more on institutional design than on the ethics of official action.³⁰⁷ Indeed, Henry Hart pushed beyond H. L. A. Hart’s analysis and identified “[e]xtrinsic checks” on discretionary power, including elections, impeachment, reappointment, and powers of review.³⁰⁸ H. L. A. Hart, however, had mentioned, though not detailed, the possibility of extrinsic constraints the week before, highlighting the responsibility of reasoned discretion even though “it may of course be that the system fails to provide a remedy if [officials] do indulge their whim”³⁰⁹ — acknowledging the possibility of such remedies, but holding firm that the legal system asks more of those to whom it commits discretion than merely to evade extrinsic check.

As Henry Hart’s thinking developed, he began to wonder whether judicial decisions in indeterminate cases could ever be objectively correct. In November 1957, just months after H. L. A. Hart’s departure from Harvard, Henry Hart wrote to Fuller to explain the “analysis I have been reaching for lately in trying to distinguish the exercise of discretion from the exercise of the judicial function.”³¹⁰ “Discretion, it seems to me,” he wrote, “involves the act of choice between two or more alternatives . . . each of which is regarded as permissible. Adjudication involves choice between two alternatives, one of which is regarded as right . . .”³¹¹ He seemed to be searching for legal certainty, nursing a distinctly proto-Dworkinian sentiment and departing from H. L. A. Hart’s view that indeterminacy is an inherent part of law and discretion an inherent part of adjudication. Yet Henry Hart’s thinking did not take him down a fundamentally different track from H. L. A. Hart’s analysis in *Discretion*: Henry Hart went on to concede that “[r]ight’ means rationally justifiable by reasoning from settled or properly assumed premises,”³¹² which harmonized with H. L. A. Hart’s criterion for sound discretion.

³⁰⁷ Hart Notes on *The Place of Discretion in the Legal System*, *supra* note 23, at 5 (emphasis added).

³⁰⁸ *Id.*

³⁰⁹ Hart, *Discretion*, *supra* note 12, at 657.

³¹⁰ Nov. 5, 1957, Letter from Henry Hart to Lon Fuller, *supra* note 18, at 2.

³¹¹ *Id.*

³¹² *Id.*

Henry Hart's famous Foreword to the 1958 Supreme Court Term (which he largely completed during the Legal Philosophy Discussion Group's first year³¹³) pursued the theme of rational certainty in law further.³¹⁴ As Professor G. Edward White interprets it, Hart's Foreword professed a deep faith in reason.³¹⁵ Hart suggested that, "given adequate time and discussion, the thinking of judges about particular cases, perhaps initially a product of their idiosyncratic presuppositions, could mature into something more synonymous with 'reason,' a suprapersonal construct."³¹⁶ Hart's Foreword "assumed that for every judicial problem there is ultimately a 'reasonable' solution."³¹⁷ Here, Henry Hart's notion of judicial evolution toward reason is similar to a view H. L. A. Hart had expressed in *Discretion*: the idea that judges — perhaps even the legal system as an organic whole — can get better at discretionary decisionmaking with experience, in light of what H. L. A. Hart called the "progressive evolutionary discovery of important and hence justifying factors."³¹⁸ Although Henry Hart again flirted with the possibility of one "'reasonable' solution" to every case, he ultimately agreed with H. L. A. Hart that indeterminacy is inevitable in some cases, no matter how sound the process, how experienced the judge, or how mature the legal system.

In light of these points of similarity, the Hart-Hart debate turned out not to be much of a debate at all. The two Harts expressed considerable agreement about the necessity of indeterminacy in the legal system and the responsibilities of officials charged with its resolution.

There were also, of course, lasting differences. Despite the meeting of the minds about the obligations of legal decisionmakers, Henry Hart was primarily concerned with law's institutional realization and skeptical of the value of H. L. A. Hart's linguistic philosophy. Yet eventually, and perhaps grudgingly, Henry Hart came to recognize some virtue in analyzing the linguistic and conceptual nature of discretion — even highlighting the importance of such an analysis in *The Legal Process* materials themselves. The editors asked in the preface to the "tentative edition" presented in 1958: "What, if any, are the differences between the discretion of a court and the discretion of legislators? Or of the discretion of administrative officials in various kinds

³¹³ Eskridge & Frickey, *supra* note 1, at 2048.

³¹⁴ See Henry M. Hart, Jr., *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

³¹⁵ See White, *supra* note 51, at 287–88.

³¹⁶ *Id.* at 287.

³¹⁷ *Id.*

³¹⁸ Hart, *Discretion*, *supra* note 12, at 660. H. L. A. Hart's notion that discretionary decisionmaking can evolve for the better also resonates, on a less systematic level, with Henry Hart's notion of "the maturing of collective thought." White, *supra* note 51, at 288 (quoting Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1312 (1960)).

of contexts? Or of the discretion of private persons? What, anyway, do we mean by ‘discretion?’³¹⁹ Although the editors did not explicitly attribute this line of thought to H. L. A. Hart, the influence of his analysis of discretion is clear.³²⁰

Continuing his initial interest in his namesake’s thinking, Henry Hart watched H. L. A. Hart’s career closely in the years after they first met. In 1965, four years after H. L. A. Hart wrote *The Concept of Law* and after several exchanges with Fuller, Henry Hart wrote a lengthy memo to Fuller analyzing H. L. A. Hart’s jurisprudence. “I myself am disposed to . . . define law openly (in substance if not in the same words) as ‘the enterprise of subjecting men to the governance of rules in such a way as to realize, as well as may be, the benefits of social living,’” Henry Hart wrote,³²¹ in contrast to H. L. A. Hart’s definition of law as a system of rules identified by a rule of recognition. Indeed, for Henry Hart, law is a dynamic social *enterprise*, not a static system of rules. Henry Hart understood law as a “purposive activity” inextricably linked to the values it seeks to realize and the ends it aims to achieve.³²² He believed that legal analysis that ignores those ends, in the process expelling value from the province of jurisprudence, necessarily ignores some of law’s most significant characteristics.³²³ The most fundamental difference between the Harts, therefore, was that

³¹⁹ HART & SACKS, *supra* note 23, at cxxxviii.

³²⁰ Sebok notes that H. L. A. Hart made one explicit appearance in *The Legal Process*, when the editors discussed his “definition of duty.” SEBOK, *supra* note 22, at 169.

³²¹ Henry M. Hart, Jr., Some Notes on H. L. A. H.’s Review 3 (Feb. 9, 1965) (on file in the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 14) (analyzing H. L. A. Hart’s review of Fuller’s *The Morality of Law*, almost to the point of obsession). Although Henry Hart clearly took Fuller’s side in the (H. L. A.) Hart-Fuller exchange, Henry Hart recognized some weaknesses in Fuller’s position.

³²² HART & SACKS, *supra* note 23, at 148.

³²³ While the process theorists believed that legal theory needs to reflect law’s status as a “purposive activity,” they expected the legal process itself to be as value-*neutral* as possible, providing a guide for social cooperation for citizens regardless of their substantive value preferences. According to one scholar, a professor connected with the Process School “joked that the essence of his philosophy was summed up by the Fats Waller song ‘It Ain’t Whatcha Do, It’s the Way Thatcha Do It.’” GEOFFREY KABASERVICE, *THE GUARDIANS* 110 (2004). Further, for (Henry) Hart and Sacks, “the fundamental purpose of society [was], to the extent possible, to ‘maximize the total satisfactions of valid human wants.’” Barzun, *supra* note 16, at 21 (quoting HART & SACKS, *supra* note 23, at 104). This purpose bespoke a utilitarian — not perfectionist — aim in law (as well as a singular faith in the power of technocratic government). The legal process, for (Henry) Hart and Sacks, serves to decentralize value choices, further reflecting the liberalism of the Cold War era. Further, the “principle of institutional settlement,” HART & SACKS, *supra* note 23, at 4 (emphasis omitted), associated legal validity with institutional provenance, not substantive outcome — linking (Henry) Hart and Sacks with the positivist sources thesis. Yet from their theoretical perspective, law, the tool society uses to further its goals, is unintelligible except in light of its fundamental objectives, Hayekian and somewhat utilitarian as they may be.

Henry Hart despised legal positivism.³²⁴ He “was tremendously against positivism,” H. L. A. Hart recalled.³²⁵ “And while he thought one or two things I’d done were good,” — presumably, the analysis of discretion chief among them — he “felt I was tragically misleading.”³²⁶

*B. Purposivism and Positivism:
Discretion and the Hart-Fuller Debate*

While *Discretion* provoked a short-lived Hart-Hart debate, it also launched the legendary Hart-Fuller debate, the quarrel over the conceptual relationship between law and morality that remains a cornerstone of jurisprudence today. Although the direct impetus for the written Hart-Fuller exchange was Hart’s Holmes Lecture in April — at which Fuller paced “‘back and forth at the back of the lecture hall like a hungry lion’ and [left] half way through the question session”³²⁷ — the Legal Philosophy Discussion Group, and the discussion surrounding *Discretion*, likely provided Hart’s first point of direct academic engagement with Fuller, who listened carefully, unaware that he would one day be remembered as one of Hart’s most famous interlocutors.³²⁸ Although the Hart-Fuller debate has provoked a vast secondary literature, *Discretion* clarifies Hart’s early position on the role of purpose in law — a pivotal topic that received relatively little treatment in later rounds of the debate.

For Fuller, purpose lay at the core of the law in two connected ways, each informing his antipositivism. First, law’s purposive character is part of law’s definition: law *is* a “purposive activity,” and a legal theory that ignores law’s purposive character is as inaccurate as any other reductively externalist description of purposive human conduct.³²⁹ Second, legal reasoning and adjudication require an attempt to give effect to the specific purposes underpinning the laws at issue.³³⁰

Discretion demonstrates that Hart took a nuanced, split position on this issue — a position he did not make as clear in later work. In

³²⁴ See Hart, *supra* note 63, at 932, 936 (describing Justice Holmes’s “uncomprising positivism,” *id.* at 932, and asserting that he “confused the relationship of law and morals,” *id.* at 936); see also *supra* note 116.

³²⁵ Sugarman, *supra* note 124, at 280 (quoting Hart).

³²⁶ *Id.* (quoting Hart) (internal quotation mark omitted).

³²⁷ LACEY, *supra* note 16, at 197 (quoting a July 1991 letter from Joel Feinberg to H. L. A. Hart).

³²⁸ For an account of Fuller’s pre-Hart legal theory, see RUNDLE, *supra* note 61, at 25–48.

³²⁹ For examples on this point, see Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 697–99 (1956), an essay Fuller wrote shortly after Hart’s *Discretion*.

³³⁰ See Leiter, *supra* note 29, at 1157 (“[T]he Legal Process theory of adjudication as ‘reasoned elaboration’ involves an essentially anti-positivist view of law, because it makes morality a criterion of legality by its emphasis on ‘purposive’ interpretation.”); Sebok, *supra* note 37, at 1575 (suggesting that (Henry) Hart and Sacks adopted Fuller’s theory of adjudication). See generally Fuller, *supra* note 139.

Hart's view, purpose is indeed a part of legal reasoning, but not fundamentally relevant to what makes law *law*. Hart agreed with Fuller's epistemic claim that adjudication and legal reasoning involve purposive analysis. But he rejected Fuller's ontological claim that law's purposive character and the goals law pursues are part of law's *definition* — part of what distinguishes law from other forms of social ordering.³³¹

1. *Purpose in Legal Reasoning.* — In *Discretion*, Hart suggested that discretionary decisionmakers are required to analyze and weigh the law's perhaps unclear, perhaps conflicting general aims — the potential vagueness of which is itself the source of much indeterminacy in law (owing to the “Relative Indeterminacy of Aim”) — and reformulate those aims so they can apply more clearly to the case at hand, producing “pro tanto” determinacy.³³²

Hart's example of a judge applying the standard of due care in civil negligence,³³³ a case in which the “Relative Ignorance of Fact” and the “Relative Indeterminacy of Aim” collude to create indeterminacy, illustrates how Hart understood purposive analysis fitting into discretion. Hart observed that the due care standard indeed has purposes, easily stated at a general level:

What we are striving for in the application of standards of reasonable care is (1) to insure that precautions will be taken which will avert substantial harm, yet (2) that the precautions are such that the burden of proper precautions does not involve too great a sacrifice of other respectable interests.³³⁴

But he pointed out that these aims prove vague and indeterminate when applied to specific, unforeseen cases. In application, the discretionary process requires the judge to “weigh and choose between or make some compromise between competing interests and thus render more determinate our initial aim.”³³⁵ Put this way, Hart saw discretion as a process of rationally reformulating and contextualizing general aims so that they can more determinatively apply to specific cases.

³³¹ There are of course numerous theoretical positions legal positivists might adopt on the question of purpose in law, and numerous complicating questions philosophers might ask. *Discretion* did not take up this issue as a problem in need of direct, careful explication. Hart's essay did, however, sketch a position that clarifies his basic response to Fuller. It also helps to reveal the dilemmas that led Hart to endorse “soft positivism” decades later, once the distinction between hard and soft positivism had been introduced. See HART, THE CONCEPT OF LAW, *supra* note 41, at 250. Hart took law's *most* basic purposes more seriously in *The Concept of Law*, however, where he defended the thesis that law's fundamental goal of facilitating human survival demands a “minimum content” to any legal order. See *id.* at 193–200.

³³² Hart, *Discretion*, *supra* note 12, at 663.

³³³ *Id.* This example and accompanying explanation appeared almost verbatim in *The Concept of Law*. See HART, THE CONCEPT OF LAW, *supra* note 41, at 132–33.

³³⁴ Hart, *Discretion*, *supra* note 12, at 663.

³³⁵ *Id.*

In the case of the due care standard, “our aim of securing people against harm is indeterminate til we put it in conjunction [with] or test it against possibilities which only experience will bring before us: when it does then we have to face a decision which will, when made, render our aim pro tanto determinate.”³³⁶ Once the aim is so rendered, the judge can combine it with other relevant factors, which, all together, can have the cumulative effect of making the case itself “pro tanto determinate” and therefore resolved, though not perfectly conclusively.³³⁷

2. *Purpose in Legal Theory.* — Although Hart clearly envisioned purpose factoring into legal reasoning, he seemed to reject the claim

³³⁶ *Id.* (alteration in original).

³³⁷ It is worth noting that even though Hart’s illustration of legal reasoning was restricted to indeterminate cases (mainly those cases with vague or conflicting purposes), *Discretion* contained inklings of the idea that purposive analysis is part of legal reasoning *even in core cases*. As we have seen, in the Holmes Lecture, Hart attributed legal indeterminacy to *linguistic* indeterminacy. A rule proves indeterminate in application because of the inherent vagueness of the words with which the rule is expressed. But in *Discretion*, Hart did not discuss the indeterminacy of language; he attributed legal indeterminacy to the “handicaps” on prospective lawmaking (something he mentioned again in *The Concept of Law*) — among them the “Relative Indeterminacy of Aim.” *Id.* at 661; HART, *THE CONCEPT OF LAW*, *supra* note 41, at 125. This account of indeterminacy has two implications. First, and most obviously, *unclear* aims and goals can be a source of *indeterminacy* in cases where the law does not apply clearly, and discretion becomes necessary. Second, and less obviously, *clear* aims and goals can be a source of *determinacy* in cases where the law does apply clearly. Purpose is part of what makes easy cases easy, just as it is part of what makes hard cases hard. Fuller, however, understood Hart as endorsing purposive analysis only in the penumbra. Fuller wrote, summarizing Hart’s theory:

When the object in question (say, a tricycle) falls within this penumbral area, the judge is forced to assume a more creative role. He must now undertake, for the first time, an interpretation of the rule in the light of its purpose or aim. Having in mind what was sought by the regulation concerning parks, ought it to be considered as barring tricycles?

Fuller, *supra* note 139, at 662. For a discussion on this point see TAMANAHA, *supra* note 8, at 168–69 (noting that Hart foresaw purpose as relevant only in indeterminate cases, while Fuller argued that purpose always enters the picture). In a later work, in 1983, Hart revisited this point, stating explicitly that purpose could be relevant to “what it is that makes clear cases clear.” HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 46, at 8; *see also* TAMANAHA, *supra* note 8, at 245 n.59. While this conception of purpose may have been a concession in light of the Holmes Lecture, *Discretion* may suggest that this idea was part of Hart’s position all along, though clearly not fully worked out. Hart confessed that he put too much weight in the Holmes Lecture on the indeterminacy of legal language, and that he ignored the role purpose plays in clarifying purely linguistic indeterminacy: “[T]he obvious or agreed purpose of a rule may be used to render determinate a rule whose application may be left open by the conventions of language.” HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 46, at 8. In other words, Hart did envision purposive analysis in the core; in fact, purpose is part of what designates these cases as core cases, though they may appear penumbral when viewed from a purely linguistic perspective. It would be a mistake to infer from this observation that Hart envisioned a semantic hierarchy in which purpose can enter the analysis only if language is indeterminate: Hart also said that “the obvious or agreed purpose of a rule . . . may serve to show that words in the context of a legal rule may have a meaning different from that which they have in other contexts,” suggesting that purpose and language contribute mutually to the meaning of legal rules in core cases. *Id.* Importantly, Hart reiterated that purposes are not always “obvious or agreed” upon — there are always genuinely *indeterminate* cases with genuinely *unclear* purposes. *Id.*

that purpose is relevant to law's fundamental definition. For that matter, he seemed to reject the claim that purpose can be relevant to *anything's* fundamental definition. Near the start of *Discretion*, Hart noted that:

Very often . . . the question "What is X?" and the question "For what purposes do we in fact use X?" must be considered together. This is obviously the case where the expression in question, X, like the word "knife" turns out on investigation to refer to some instrument designed for some purpose.³³⁸

With terms like "knife," Hart observed, "what the thing is used for actually enters in to the meaning of the expression."³³⁹

Hart's key observation, though, was that it is impossible to determine *ex ante* whether purpose is an important component of a term's meaning. Whether something has essential, latent purposes can be discovered only *after* an initial purpose- and value-free linguistic analysis has taken place: "[W]hether this [that is, purpose being a component of meaning] is the case or not cannot be settled in advance of inquiring what the standard use of the term in question is."³⁴⁰ Hart seemed to accept — *ex post* — that law is indeed a purpose-laden endeavor (like a knife), but he rejected the claim that law's purposive character is part of law's definition.

This analysis reflected Hart's deeper philosophical approach to definition. In his Inaugural Lecture in 1953, he had rejected the genus-species approach to definition (on which purpose can be an element of definition: of sharp objects, knives are those designed and used for cutting, and so on) in favor of an approach rooted in ordinary language usage.³⁴¹ In the words of *Discretion*, definition only involves determining "what the standard use of the term in question is."³⁴² Accordingly, the philosophical determination of what something *is* does not involve analysis of what it is *for*; the purposive inquiry is a secondary question to be answered after a definition has been formulated. The law is no exception.

In *Discretion*, Hart lamented that confusion on this point muddles philosophical discussion, observing that attempts at definition sometimes become forums for debates about what the thing being "defined" *ought* to be like. "An example of this situation is, I think, discussion of what the State is," Hart wrote.³⁴³

³³⁸ Hart, *Discretion*, *supra* note 12, at 654.

³³⁹ *Id.* Hart seemed particularly interested in cutlery throughout his essay.

³⁴⁰ *Id.*

³⁴¹ Hart, *Definition and Theory in Jurisprudence*, *supra* note 104.

³⁴² Hart, *Discretion*, *supra* note 12, at 654.

³⁴³ *Id.*

[T]here is little disagreement that the State is in fact an organization of persons living on a territory under a certain type of legal system: the real dispute is more as to what form the State should take consistent with these primary features and what we want the State to [do] for us.³⁴⁴

Hart further believed that any helpful discussion of “what form the state should take” or “what we want the state to [do] for us” (or indeed what role discretion should play in the legal system) can proceed only after one formulates an analytical definition based on linguistic usage.

As Hart understood it, therefore, his account of legal reasoning in *Discretion* did not commit him to an antipositivist position. The separation of epistemology from ontology gave him a way to accept that legal reasoning requires the appeal to value-laden factors while at the same time maintaining that legal theory, the bird’s-eye philosophical account of the whole legal system, can be entirely value-neutral and positivistic. Thus *Discretion* did not cede ground to Hart’s American colleagues in the broader dispute over the fact-value distinction. The essay revealed Hart to be a purposivist *and* a positivist; he remained firm that legal reasoning and legal theory are different things. Just as Hart had admonished the realists for being too quick to leap from the fact of judicial choice to the prediction theory of law, he found fault with Fuller for being too quick to leap from the fact of purposive legal reasoning to the conceptual integration of law and morality.

The compatibility of Hart’s embrace of purposive analysis in discretion with his firm separation of fact from value on a definitional level was a theme to which Hart returned without much detail in further exchanges with Fuller. In his Holmes Lecture, Hart cited “the rightness of deciding cases by reference to social purposes” but focused more closely on explaining how Fuller’s *claim* that legal reasoning requires reference to purpose does not entail a logical connection between law and morality.³⁴⁵ In a later round of the debate, Hart would again deny that the identification of law as a “purposive activity” proves a necessary connection between law and morality, this time making the slightly different argument that “the notions of purposive activity and morality” are “two notions that it is vital to hold apart.”³⁴⁶

³⁴⁴ *Id.* On this point, see Fuller’s apparent response in *Human Purpose and Natural Law*, written shortly after *Discretion*, where he discussed questions like, “What is Art?” Fuller, *supra* note 329, at 704. “It is said,” Fuller wrote, that phrasing questions in that way, invites a confusion of fact and value and serves generally as a cover for a fraudulent intent to pass off the subjective opinion of the author about what art ought to be for a description of what it is in fact, — as if it were possible to describe a major area of human striving without participation in that striving and as if that participation could be otherwise than creative!

Id.

³⁴⁵ Hart, *Positivism and the Separation of Law and Morals*, *supra* note 37, at 612.

³⁴⁶ H. L. A. Hart, Book Review, 78 HARV. L. REV. 1281, 1286 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)).

Poisoning is a purposive activity, Hart famously observed (presumably, one any young hostess should avoid, unless, in her discretion, desperate times call for desperate measures), but the principles guiding good poisoning are not *moral* principles in any sense of the word; they are merely principles of efficacy.³⁴⁷

Hart did not make much headway with Fuller on the limits of purpose's role in legal theory. Fuller remained obsessed with purpose — and the association between purpose and morality — his whole career. This difference became something of a sticking point between the two men, one they were not shy to joke about in later years. The jokes, however, only reiterated the basic difference: Hart believed purpose is relevant, but only to a point. In his review of Fuller's book *The Morality of Law*, Hart wrote:

The author has all his life been in love with the notion of purpose and this passion, like any other, can both inspire and blind a man. . . . The inspiration is so considerable that I would not wish him to terminate his longstanding union with this *idée maîtresse*. But I wish that the high romance would settle down to some cooler form of regard. When this happens, the author's many readers will feel the drop in temperature; but they will be amply compensated by an increase in light.³⁴⁸

The remark amused Fuller, who wrote privately to Hart:

All I can say of Miss Purpose is that the Old Girl still looks good to me. One of her enduring charms is that she is a very complex creature indeed, subject to unpredictable moods of surrender and withdrawal. I believe deeply in her without pretending that I really understand her. So the high romance of which you complain will probably continue despite your thoughtful warning that our liaison promises trouble.³⁴⁹

C. *The Right Answers Thesis: Discretion and the Hart-Dworkin Debate*

For Hart, purposive analysis was an important but ultimately somewhat impotent part of legal reasoning, arising in “the sphere where arguments in favour of one decision or another may be rational without being conclusive.”³⁵⁰ In *Discretion*, Hart warned against the dream that purposive analysis — or *any* kind of analysis — can resolve every confusion, fill every gap, or render indeterminacy itself an illusion borne of insufficient judicial insight. The “recognition of an implicit guiding purpose,” he wrote, “may encourage the illusion that

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 1296; *see also id.* at 1295–96.

³⁴⁹ Letter from Lon L. Fuller, Professor of Law, Harvard Law Sch., to H. L. A. Hart, Professor of Jurisprudence, Univ. of Oxford 1 (Feb. 3, 1965) (on file with the Harvard Law School Library, Papers of Lon L. Fuller, Box 3, Folder 14).

³⁵⁰ Hart, *Discretion*, *supra* note 12, at 665.

we never reach the point where we have to reconcile conflicting values or choose between them without some more ultimate principle to guide us,” but it will never conclusively resolve every indeterminate case.³⁵¹ Purposes can constrain and guide decisionmaking, to be sure, but ultimately cannot provide unique “right answers” every time.

In the 1970s and 1980s, a comprehensive “right answers thesis” emerged in the work of Dworkin.³⁵² Dworkin argued that unique right answers exist for every legal question, and that those answers are accessible to judges who fully and rightly weigh all relevant considerations — considerations extending all the way to the deepest moral and political foundations of the legal system. In the eyes of Dworkin’s mighty Judge Hercules, the ideal jurist capable of taking *everything* into consideration, there is no indeterminacy; in our mortal eyes, therefore, indeterminacy is an illusion. In areas of *perceived* indeterminacy, Dworkin argued that judges should select the decision that fits best with the legal system as a whole — with its rules, precedents, and principles, and with the underlying moral and political values that make the legal order coherent. There will, he maintained, be exactly one such decision.³⁵³

Dworkin’s theory contrasted with Hart’s at almost every level.³⁵⁴ Dworkin insisted on the integration of law and morality and denied the necessity of legal indeterminacy, claiming that “right answers” emerge from the fusion of fact and value. Late in his life, Hart would identify the right answers thesis as the “sharpest direct conflict” between his work and Dworkin’s — a dispute “aris[ing] from my contention that in any legal system there will always be certain legally unregulated cases” where the law is “partly indeterminate or incomplete.”³⁵⁵ Throughout the 1980s, Hart grew anxious about the consequences of Dworkin’s theories and struggled to articulate a reply.³⁵⁶ When Hart did respond in the (posthumously published) “Post-

³⁵¹ *Id.* (internal quotation marks omitted).

³⁵² See generally RONALD DWORIN, *LAW’S EMPIRE* 45–112 (1986) [hereinafter DWORIN, *LAW’S EMPIRE*]; RONALD DWORIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14 (1977) [hereinafter DWORIN, *The Model of Rules I*]; RONALD DWORIN, *The Model of Rules II*, in *TAKING RIGHTS SERIOUSLY*, *supra*, at 46; RONALD DWORIN, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY*, *supra*, at 81; Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY*, *supra* note 27, at 58.

³⁵³ See DWORIN, *LAW’S EMPIRE*, *supra* note 352, at 239–50 (discussing Judge Hercules).

³⁵⁴ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 261 (citing DWORIN, *The Model of Rules I*, *supra* note 352, at 26).

³⁵⁵ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 272.

³⁵⁶ LACEY, *supra* note 16, at 328–37 (discussing the relationship between Hart and Dworkin).

script" to *The Concept of Law*, he returned to positions he first proposed in *Discretion*.³⁵⁷

The "Postscript" rejected the right answers thesis and asserted the necessary role discretion plays in the legal system. In "legally unregulated" cases, Hart wrote, the judge "must exercise his *discretion* and *make law*."³⁵⁸ Hart put special emphasis on the word "*discretion*" with italics, but did not say anything more about what discretion is or how it fits into a more comprehensive view of the law. This part of the "Postscript," seen this way, was an abridged restatement of the *Discretion* paper; the "Postscript" relied on the same ideas but set them out in much less detail. In *Discretion*, Hart unambiguously rejected what would become Dworkin's position on judicial reasoning, arguing that indeterminacy is inherent and that discretion, and therefore adjudication in hard cases, "necessarily" requires a "leap." To Hart, even the word "right" was a stranger in a strange land when it came to discretionary decisions; the best one can hope for is "sound" or "wise."³⁵⁹

More specifically, *Discretion* foreshadowed — and rejected — Dworkin's position that indeterminacy can be eliminated — that is, proven to be illusory — if legal reasoning integrates the application of rules with the interpretation of principles, purposes, and other abstract, value-laden considerations. In Hart's illustrations of discretion — the young hostess's dinner party, for example — decision-makers weighed rules, standards, values, principles, and purposes all interconnected in the same "grand matrix."³⁶⁰ In other words, *Discretion* implicitly rejected the rule-principle distinction. Faced with a "grand matrix" of rules, standards, principles, and purposes, a judge must exercise discretion, rooted in and constrained by reason, identify the set of norms at all levels of abstraction that are appropriate to the resolution of the case, and then make a rational "leap."³⁶¹ The "Postscript," in direct chronological reply to Dworkin, reiterated this argument, painting a picture of norms of various kinds existing on the same continuum of abstraction and dismissing the implication that rules and principles are fundamentally different or that operating in tandem they can render indeterminacy an illusion.³⁶²

In truth, Hart's vision of legal reasoning in the *Discretion* paper was not entirely out of tune with the theory of judicial reasoning in

³⁵⁷ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 272–76. Lacey, however, points out that Hart was aware of Dworkin and some of his jurisprudential views by 1956, when Hart marked Dworkin's jurisprudence examinations at Oxford. LACEY, *supra* note 16, at 185–86.

³⁵⁸ HART, *THE CONCEPT OF LAW*, *supra* note 41, at 272.

³⁵⁹ Hart, *Discretion*, *supra* note 12, at 660 (discussing the young hostess).

³⁶⁰ *Id.* at 663.

³⁶¹ *Id.* at 665.

³⁶² See HART, *THE CONCEPT OF LAW*, *supra* note 41, at 262.

hard cases that Dworkin would adopt. In a particularly telling remark, Hart wrote that “where discretion is used in the course of judicial determinations in the attempt to apply rules” — in other words, in judicial interpretation — “the weight of factors such as consistency with other parts of the legal system will be prominent.”³⁶³ Hart’s attention to “consistency with other parts of the legal system” is similar to Dworkin’s insight that decisions should “fit” with the entirety of the law. Hart, like Dworkin, valued the coherence and internal consistency of the legal system and believed that judges should deploy their craft in pursuit of the law’s integrity. Hart even said that more abstract considerations deserve “weight” in discretionary decisions — Dworkin’s word exactly.³⁶⁴

But Hart was very clear that no perfect combination of rules and principles, properly weighed, would ever render indeterminacy an illusion. Hart’s judge and Judge Hercules both appeal to principles “deserving of rational approval,” and both search for decisions that cohere with the integrity of the whole legal system.³⁶⁵ But sooner or later they part ways, as Hart’s judge takes the inevitable “leap” and makes a rational choice. Discretion, Hart argued, even “after we have done all we can to secure the optimum conditions for its exercise,” is a form of choice — choice significantly constrained by reason and institutional role, but choice all the same.³⁶⁶

CONCLUSION: BETWEEN THE NIGHTMARE AND THE NOBLE DREAM

This Essay has attempted to make sense of H. L. A. Hart’s lost essay by revisiting H. L. A. Hart’s America — Hart’s complicated relationship with American legal thought, his close interaction with the Legal Process School, and his debates with Fuller and Dworkin. In one sense, *Discretion* represents a meeting of two worlds, as the tradition of Hobbes and Hume collided with the tradition of Holmes and Hohfeld. Yet in a deeper sense, *Discretion* represents a key moment of reciprocal influence in the history of ideas, illustrating Hart’s conscious effort to apply his philosophical energy to theoretical problems at the core of American jurisprudence, as well as the extent of the Process School’s influence on his thinking. In the early 1950s, Hart and the

³⁶³ Hart, *Discretion*, *supra* note 12, at 665. By contrast, the weight of factors “may be at their minimum in cases of Avowed Discretion exercised by, say, a rate-fixing body.” *Id.*

³⁶⁴ *Id.*; see also DWORKIN, *LAW’S EMPIRE*, *supra* note 352, at 229–63; DWORKIN, *The Model of Rules I*, *supra* note 352, at 26.

³⁶⁵ *Discretion* helps to illustrate the differences between Judge Hercules and the *real* Judge “Herbert,” the name Dworkin gave “playfully (and in many people’s view, disrespectfully)” to the metaphorical Judge Hercules’s “less ambitious judicial colleague.” LACEY, *supra* note 16, at 331.

³⁶⁶ Hart, *Discretion*, *supra* note 12, at 665.

process theorists found themselves on similar intellectual trajectories. Both sought a middle road between formalism and realism, and both put their faith in reason — a vague yet potentially redemptive ideal — as the way forward. Hart believed that legal officials, facing decisions in the sphere of indeterminacy, should exercise a form of decisionmaking similar to what the Process School called “reasoned elaboration.” And in line with process thinking, Hart tentatively solved the problem of legal indeterminacy by sketching a theory of legal reasoning. What matters most, though, is what *Discretion* reveals about Hart’s intellectual world in 1956 and the path of the philosophy of law since. The story of the Legal Philosophy Discussion Group reveals that H. L. A. Hart and Henry Hart shared a common understanding of how choice in law can be constrained, despite their differing approaches to legal scholarship. *Discretion* clarifies the Hart-Fuller debate by showing that Hart endorsed purposive analysis in legal reasoning, while rejecting any purpose- or value-oriented conception of law itself. And the essay illuminates Hart’s rejection of the right answers thesis, demonstrating that much of his response to Dworkin in the “Postscript” had in fact been formulated at Harvard in 1956.

Perhaps the most enduring lesson of *Discretion* is that the pursuit of legal certainty was not in Hart’s blood and never had been. In 1977, Hart would observe that American legal thought had always oscillated between two equally wrong extremes. He called them “The Nightmare and the Noble Dream.”³⁶⁷ Hart rejected the “Nightmare” — the realist story of unconstrained judicial choice that experienced a kind of post-process restoration with the rise of Critical Legal Studies — as much as he denied that the “Noble Dream” — the search for unique right answers in a field not capable of their production — could ever come true. Hart’s analysis of discretion, charting a middle road between the Nightmare and the Noble Dream, arose in the context of the one American jurisprudential movement that resisted the temptation of these two peculiar extremes: legal process.

As Hart saw it, the prospect of perfect legal certainty had bewitched Dworkin — “the noblest dreamer of them all,” Hart wrote, “if he and Shakespeare will permit me to say so”³⁶⁸ — and sent him on an inherently unattainable quest to identify criteria for judicial objectivity. Hart was not so much bewitched, as bothered and bewildered. He understood the Noble Dream’s appeal to American legal thinkers, who “worrie[d]”³⁶⁹ that the discretion of the unelected is fundamentally an-

³⁶⁷ See H. L. A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

³⁶⁸ *Id.* at 982.

³⁶⁹ Hart, *Discretion*, *supra* note 12, at 654.

tidemocratic. He realized that the existence of unique right answers in law could provide an ironclad justification for judicial review — the elusive solution to the “counter-majoritarian difficulty,” the problem Alexander Bickel would make famous six years after Hart’s year at Harvard.³⁷⁰ But Hart’s project was not to solve the problems of American democracy, and as he saw it, philosophy is not the servant of politics. Hart aimed to understand law in the abstract — its structure, its coherence, its modes of thought — in the clearest light. Hart’s undertaking was, from one angle, a more modest project, but for Hart it was the most fundamental task of legal philosophy.

Still, Hart’s *Discretion* was a product of a certain historical moment — a moment when Hart came into intense contact with the anxieties of the legal process generation. In fact, from one perspective, *Discretion* was the closest Hart ever got to formulating his own solution to Bickel’s problem. It would be a mistake, however, to put too much faith in this reading. Hart’s was a pre-*Brown* theory of judicial discretion composed in a post-*Brown* world. Hart did not attempt to state the precise conditions under which courts can rightly overturn the commands of electoral majorities; he failed to spell out exactly how courts should reconcile values in direct conflict; he did not say enough about what “rationality” really means, or the precise way in which it constrains decisionmaking; he did not say clearly how limited a role he envisioned courts playing in American political life. As the sun set on the legal process paradigm in the 1960s and 1970s, many of the most enduring critiques leveled against (Henry) Hart and Sacks could have been directed to H. L. A. Hart as well, to his theory of discretion and indeed to his account of law as a whole: the non-neutrality of reason, the irreconcilability of conflicting values in a pluralistic society, the inadequacy of existing institutional settlements to render justice to people excluded from the formation of those settlements, the bare legal process’s blindness to history, and more.

But for all that, *Discretion* was Hart’s answer to America’s obsessive fear that discretion and the rule of law are natural antagonists in need of some form of theoretical intercession. As Hart saw it, discretion is deeply implicit in the concept of the rule of law. It is the possibility of discretion, in contrast to arbitrary whim, that allows our regulation of the future to be lawlike, given our inherent inability to look forward in time with perfect clarity. In sketching a vision for how discretion can reconcile legal indeterminacy with the rule of law, *Discretion* represents a significant, distinctive achievement in legal theory. If

³⁷⁰ In the “Postscript,” Hart observed that the “familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases.” HART, THE CONCEPT OF LAW, *supra* note 41, at 274. “[H]ow seriously,” he asked rhetorically, “is this to be taken?” *Id.*

Dworkin's quest was to eliminate discretion, Hart's quest was to perfect it — by improving our understanding of discretionary decision-making and what enhances its quality, and by demanding that judges live up to the rational standards implicit in the concept of discretion itself. If Dworkin saw discretion as an abdication of the judicial responsibility to reason all the way to the right answer, Hart saw it as the first line of defense against a regime of lawless whim. To Hart, discretion and the rule of law were inseparable, in fact rationally conjoined — and Judge Hercules was less a Noble Dream than a deceptive myth. It is precisely “because we are men, not gods” that discretion makes possible a government of laws, not men.